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**A TREATISE**  
**ON**  
**FEDERAL PRACTICE**

**INCLUDING**

**PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES,  
FORECLOSURE OF RAILWAY MORTGAGES, SUITS  
UPON CLAIMS AGAINST THE UNITED STATES**

**EQUITY PLEADING AND PRACTICE, RE-  
CEIVERS AND INJUNCTIONS**

**IN THE STATE COURTS**

**BY**  
**ROGER FOSTER,**  
**OF THE NEW YORK BAR,**

**AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES,  
TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE  
FEDERAL INCOME TAX OF 1894, AND LECTURER ON FEDERAL  
JURISPRUDENCE AT THE LAW SCHOOL OF YALE UNIVERSITY.**

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# FEDERAL PRACTICE.

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## CHAPTER XXVIII.

### PRACTICE AT COMMON LAW IN CIVIL ACTIONS.

§ 360. **Common-law practice in general.**— Actions at common law are either civil or criminal. The Supreme Court considers the practice of the court of King's Bench in England as affording outlines for its practice at common law.<sup>1</sup> In civil actions at common law the Circuit and District Courts follow in general the practice in the courts of the State where they are held, except in those particulars which are regulated by Federal statute.<sup>2</sup> The Revised Statutes provide, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings and forms, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."<sup>3</sup> A proceeding begun by an attachment is a civil cause within the meaning of the statute.<sup>4</sup> The phrase "as near as may be" has been held not to mean "as near as may be possible" nor "as near as may be practicable;"<sup>5</sup> but to devolve upon the Federal courts the duty of construing and deciding, and to give them the power to reject any subordinate provision in such State statutes, which in their judgment would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals.<sup>6</sup> The State practice will not be so

§ 360. <sup>1</sup> Supreme Court Rule 3.

<sup>2</sup> U. S. R. S., § 914.

<sup>3</sup> U. S. R. S., § 914.

<sup>4</sup> *Citizens' Bank v. Farwell* (C. C. A.), 56 Fed. R. 570.

<sup>5</sup> *L. & St. L. R. Co. v. Horst*, 93 U. S.

291, 301; *Phelps v. Oaks*, 117 U. S. 236, 239.

<sup>6</sup> *L. & St. L. R. Co. v. Horst*, 93 U. S. 291, 301; *Phelps v. Oaks*, 117 U. S. 236, 239. See *Shepard v. Adams*, 168 U. S.

618.

far allowed as to permit an equitable defense,<sup>7</sup> or an equitable set off,<sup>8</sup> to be pleaded in an action at common law. The pleading must show the jurisdiction, including the defendant's residence.<sup>9</sup> It is the safer practice to plead an objection to the jurisdiction by a special plea in abatement, no matter what the State statute may be.<sup>10</sup>

<sup>7</sup> *Doe v. Roe*, 81 Fed. R. 97; *Bennett v. Butterworth*, 11 How. 669; *Montijo v. Owen*, 14 Blatchf. 324; *Parsons v. Denis*, 7 Fed. R. 317; *Buller v. Slidell*, 43 Fed. R. 116; *Schoolfield v. Rhodes*, 82 Fed. R. 153; *Davis v. Davis* (C. C. A.), 72 Fed. R. 81; *Young v. Mahoning County*, 51 Fed. R. 585, 590. See *N. Pac. R. Co. v. Paine*, 119 U. S. 561; *Wilcox & Gibbs Guano Co. v. Phenix Ins. Co.*, 61 Fed. R. 199. The misconduct of arbitrators not apparent upon the face of the award, and not affecting their jurisdiction, cannot be pleaded to an action at law upon the award. *Hartford F. Ins. Co. v. Bonner M. Co.*, 44 Fed. R. 151, 156. Where the plaintiff had an equitable defense to a release pleaded by the defendant, the trial judge postponed the trial in order to allow the plaintiff to bring an independent suit in equity to set aside the release. *Vandervelden v. Chicago & N. W. Ry. Co.*, 61 Fed. R. 54. A State statute allowing a champertous agreement to be pleaded in abatement to an action was not followed by a Federal court. *Byrne v. Kansas City, Ft. S. & M. R. Co.*, 55 Fed. R. 44. It has been held that in actions at law in the Federal courts plaintiff cannot file interrogatories to be answered by defendant. *Tabor v. Indianapolis Journal Newspaper Co.*, 66 Fed. R. 423. It has been held that annexing to a complaint, as an exhibit, a copy of the contract sued upon, with a reference to the same in the body of the pleading, is not equivalent to positive allegations in the complaint of the terms of the contract according to their legal effect or *in hæc*

*verba*. *Penrose v. Pac. Mut. L. I. Co.* (D. Montana), 66 Fed. R. 258. And that a suit upon a special contract not executed must be on a count setting out the special contract; but when the special contract has been executed the common counts are sufficient. *Chesapeake & O. C. Co. v. Knapp*, 9 Peters, 541, 563; *Dawes & Co. v. Peebles' Sons Co.*, 6 Fed. R. 856, 858. As to what defenses may be proved under the general issue in *assumpsit* under the common counts, see *Dawes & Co. v. Peebles' Sons Co.*, 6 Fed. R. 856, 859.

<sup>8</sup> *Scott v. Armstrong*, 146 U. S. 499. *Contra* as to a common-law set-off, *infra*, note 48.

<sup>9</sup> *Laskey v. Newton*, 50 Fed. R. 634.

<sup>10</sup> *Jones v. Rowley*, 73 Fed. R. 236. It has been held at circuit, that, no matter what the State practice may be, a denial of allegations of jurisdictional facts in the plaintiff's declaration or other pleading at law can only be made by a special plea to the jurisdiction, and is waived by a general denial or by a plea to the merits; although the court may of its own motion institute at any time an inquiry into the truth of such facts. *Imperial Ref. Co. v. Wyman*, 38 Fed. R. 574; *National Masonic Ass'n v. Sparks*, 83 Fed. R. 225. See *Hartog v. Memory*, 116 U. S. 588; *Foster v. Cleveland, C., C. & St. L. Ry. Co.*, 56 Fed. R. 434. *Contra*, *Ehrman v. Teutonia Ins. Co.*, 1 Fed. R. 471; *Draper v. Springport*, 15 Fed. R. 328. See *Rubel v. Beaver Falls C. Co.*, 22 Fed. R. 282; *Deputron v. Young*, 134 U. S. 241, 251; *Roberts v. Lewis*, 144 U. S. 658; *Dexter v. Say-*

In the following particulars the practice at common law in civil cases in the Circuit and District Courts of the United States is regulated by Federal statutes: writs and process,<sup>11</sup> service by publication or without the district,<sup>12</sup> pleading in actions for the infringement of patents<sup>13</sup> and copyrights,<sup>14</sup> amendments,<sup>15</sup> provisional remedies,<sup>16</sup> abatement and revivor,<sup>17</sup> consolidation of suits,<sup>18</sup> evidence, testimony and depositions,<sup>19</sup> selection of juries,<sup>20</sup> trials,<sup>21</sup> motions for new trials,<sup>22</sup> judgments,<sup>23</sup> correction of judgments,<sup>24</sup> costs,<sup>25</sup> executions and proceedings supplementary thereto,<sup>26</sup> contempts,<sup>27</sup> bills of exceptions,<sup>28</sup> and writs of error.<sup>29</sup>

The Revised Statutes provide as follows concerning pleadings in actions for the infringement of patents:

“Damages for the infringement of a patent may be recovered by an action on the case, in the name of the party interested, either as a patentee, assignee or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon, for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.”<sup>30</sup>

“In any action for infringement the defendant may plead

ward. 51 Fed. R. 729, 782; *Greene v. Tacoma*, 53 Fed. R. 562.

<sup>11</sup> *Infra*, § 361. But see *Stewart v. Justices of St. Clair Co. Court*, 47 Fed. R. 482, 484.

<sup>12</sup> *Supra*, § 97.

<sup>13</sup> U. S. R. S., § 4920.

<sup>14</sup> U. S. R. S., § 4969.

<sup>15</sup> U. S. R. S., § 954; *infra*, § 361.

<sup>16</sup> *Infra*, §§ 369, 370.

<sup>17</sup> *Infra*, § 373.

<sup>18</sup> *Infra*, § 371.

<sup>19</sup> *Infra*, § 372.

<sup>20</sup> U. S. R. S., §§ 800, 882; *infra*, § 374.

<sup>21</sup> *Infra*, § 374.

<sup>22</sup> *Infra*, § 376.

<sup>23</sup> *Infra*, § 378.

<sup>24</sup> *Infra*, § 379.

<sup>25</sup> *Supra*, ch. XXV. But see *Huntress v. Epsom*, 15 Fed. R. 732; *New Hampshire L. Co. v. Tilton*, 29 Fed. R. 764. As to security for costs, see

*Henning v. W. U. Tel. Co.*, 40 Fed. R. 658.

<sup>26</sup> *Infra*, § 380.

<sup>27</sup> *Infra*, §§ 341-346.

<sup>28</sup> *Infra*, § 377.

<sup>29</sup> *Richmond & D. R. Co. v. McKee* (C. C. A.), 50 Fed. R. 906; *McClellan v. Pyeatt* (C. C. A.), 50 Fed. R. 686; *Kentucky L. & A. Ins. Co. v. Hamilton* (C. C. A.), 68 Fed. R. 93; *infra*, chapter on Writs of Error and Appeals.

<sup>30</sup> U. S. R. S., § 4919. It has been held that a part owner of the patent cannot sue at common law for an infringement unless the other owners consent to join with him as plaintiffs; and that in case of their refusal he cannot make them defendants. *Van Orden v. Nashville*, 67 Fed. R. 831. The rule in equity is otherwise. *Supra*, § 42.

the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following special matters: —

“*First.* That for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

“*Second.* That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

“*Third.* That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or,

“*Fourth.* That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

“*Fifth.* That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

“And in notices as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect.”<sup>31</sup>

<sup>31</sup> U. S. R. S., § 4920. See *supra*, § 145. A defendant may plead the general issue and also a special plea that the combination covered by the patent was not an invention, and a further plea, that the invention was not patentable. *Brickill v. Hartford*, 57 Fed. R. 216. Defenses which have been raised by demurrer and overruled cannot ordinarily be made part of the answer without leave of the court. *Ibid.*; *McClintick v. Johnson*, 1 McLean, 414. But in the District of Connecticut the court allowed such defenses to be set up again by plea, since it was uncertain whether, un-

It has been held in the Sixth Circuit that the pleadings of both the plaintiff and the defendant in such an action must conform to the rules of pleadings in actions on the case at common law.<sup>22</sup>

The Revised Statutes provide that "in all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence."<sup>23</sup>

Exemptions from service of process have been discussed in the chapter on subpoenas.<sup>24</sup>

der the State rule of pleading, an assignment of error in the ruling upon the demurrer was sufficient, when the defendant did not stand upon his demurrer, to bring the points before the court of review. *Brickill v. Hartford*, 57 Fed. R. 216. Want of patentability is a defense to such an action, although not pleaded by the defendant. *May v. Juneau County*, 187 U. S. 408. Evidence of prior use and knowledge of the thing patented will not be admitted, although pleaded, unless the prescribed notice has been given; provided a proper objection upon this ground is made. *Blanchard v. Putnam*, 8 Wall. 420. The state of the art can be shown without notice. *Vance v. Campbell*, 1 Black, 427; *Brown v. Piper*, 91 U. S. 37. It has been held that a witness may be asked whether the defendant's machine is similar to the model of the plaintiff's patented machine, although no notice of such testimony has been given. *Evans v. Hettick*, 7 Wheat. 453, 469. Evidence stated in a notice to be proposed for one purpose cannot be used for another. *Pennock v. Dialogue*, 4 Wash. 538; s. c., 2 Pet. 1. The fourth and fifth defenses named are distinct from each other, and if the defendant relies on both, he must give notice accordingly. *Meyers v. Busby*, 32 Fed. R. 670. The notice is not defective for failure to state the particular place within a named city at which the defendant proposes to prove the previous use of a patent. *Wise v.*

*Allis*, 9 Wall. 737. A notice is not a pleading, and instead of being included in the answer should be served upon the plaintiff. *Cottier v. Stimson*, 20 Fed. R. 906. See also 10 Saw. 212; *Henry v. U. S.*, 22 Ct. Cl. 75. It is a better practice to file the notice with the pleadings after it has been served. *Teese v. Huntingdon*, 23 How. 2, 10. A plea stricken out by the court is not a sufficient legal notice. *Silsby v. Foote*, 1 Blatchf. 445; s. c., 14 How. 218. The defendant may also plead his defense specially if he so desires. *Cottier v. Stimson*, 20 Fed. R. 906, 907; *Evans v. Eaton*, 3 Wheat. 454; *Grant v. Raymond*, 6 Pet. 218; *Phillips v. Combstock*, 4 McLean, 525; *Day v. N. E. C. S. Co.*, 8 Blatchf. 179. In such a case it seems that no notice may be given. *Cottier v. Stimson*, 20 Fed. R. 906, 907; *Evans v. Eaton*, 3 Wheat. 454; *Grant v. Raymond*, 6 Pet. 218; *Phillips v. Combstock*, 4 McLean, 525; *Day v. N. E. C. S. Co.*, 8 Blatchf. 179. No demurrer lies to a notice. *Henry v. U. S.*, 22 Ct. Cl. 75. A defect in the notice may be remedied by a second notice without leave of the court. *Teese v. Huntingdon*, 23 How. 2, 10.

<sup>22</sup> *Myers v. Cunningham*, 44 Fed. R. 346, per Ricks, J.; *Moy v. Mercer County*, 30 Fed. R. 246; *Marvin v. C. Aultman & Co.*, 46 Fed. R. 338, 339; *Walker on Patents*, § 442. *Contra*, *Cottier v. Stimson*, 20 Fed. R. 906, 907.

<sup>23</sup> U. S. R. S., § 4969.

<sup>24</sup> *Supra*, § 98.

It has been held that in the following cases the Circuit and District Courts will in civil actions at common law follow the statutes of the respective States where they are held: form of writ,<sup>35</sup> indorsement of writ,<sup>36</sup> indorsement of summons,<sup>37</sup> right of assignee to sue in his own name,<sup>38</sup> personal service of writ and process on individuals<sup>39</sup> and on corporations,<sup>40</sup> at least if domestic corporations,<sup>41</sup> joinder of causes of action,<sup>42</sup> joinder of parties,<sup>43</sup> verification of pleading,<sup>44</sup> time,<sup>45</sup> and manner<sup>46</sup> of service of pleading and amendment of pleading,<sup>47</sup> set off of cause of action at common law,<sup>48</sup> interpleader,<sup>49</sup> notice of trial or of

<sup>35</sup> *Brown v. C. & O. C. Co.*, 4 Fed. R. 770. See *Baltimore & O. R. Co. v. Hamilton*, 16 Fed. R. 181. It has been held that a suit in the United States Circuit Court for the penalty provided by the Act of 1885, chapter 164, section 3, for violation of the provisions of that act relating to alien contracts for labor, may be properly begun by *capias* in accordance with the State law. *U. S. v. Banister*, 70 Fed. R. 44. But see *Shepard v. Adams*, 168 U. S. 618; *infra*, § 361.

<sup>36</sup> *Brown v. Pond*, 5 Fed. R. 81, 37. But see § 361.

<sup>37</sup> *U. S. v. Rose*, 14 Fed. R. 681.

<sup>38</sup> *Edmunds v. Illinois C. R. Co.*, 80 Fed. R. 78, where the cause of action arose under a Federal statute, the Interstate Commerce Act. Where there is no State statute, the suit must be brought in the name of the assignor. *Nederland L. I. Co. v. Hall*, 84 Fed. R. 278.

<sup>39</sup> *Shampeau v. Connecticut R. L. Co.*, 37 Fed. R. 771; *Wilson v. Fine*, 38 Fed. R. 789; *Amy v. Watertown*, 130 U. S. 301. See *supra*, §§ 93-98. So held as to the form of a return of service. *Trimble v. Erie El. M. Co.*, 89 Fed. R. 51; *Wilson v. Hurst*, *Peters C. C.* 441; *U. S. v. Lotridge*, 1 McLean, 246.

<sup>40</sup> *In re Louisville Underwriters*, 134 U. S. 488, 493; *Miller's Adm'r v. Norfolk & W. R. Co.*, 41 Fed. R. 431; *McCormick H. Mach. Co. v. Walth-*

*ers*, 134 U. S. 41; *Société Foncière v. Milliken*, 135 U. S. 804. See *supra*, § 17.

<sup>41</sup> *Amy v. Watertown*, 130 U. S. 30.

<sup>42</sup> *Castro v. De Uriarte*, 12 Fed. R. 250. But see *O'Connell v. Reed* (C. C. A.), 56 Fed. R. 531; *Bowden v. Burnham* (C. C. A.), 59 Fed. R. 752; *Holt v. Bergevin*, 60 Fed. R. 1.

<sup>43</sup> *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. R. 478; *Delaware Co. Com'rs v. Diebold S. Co.*, 133 U. S. 473, 488. Non-joinder of husband in action by wife, although the woman is an alien. *Morning Journal Ass'n v. Smith* (C. C. A.), 56 Fed. R. 141.

<sup>44</sup> *West v. Home Ins. Co.*, 18 Fed. R. 622; *Cottier v. Stimson*, 18 Fed. R. 689.

<sup>45</sup> *Ricard v. Inhabitants New Providence*, 5 Fed. R. 433. But not necessarily as to the return day. *Ewing v. Burnham*, 74 Fed. R. 384.

<sup>46</sup> *Wilson v. Fine*, 38 Fed. R. 789.

<sup>47</sup> *Rosenbach v. Dreyfuss*, 1 Fed. R. 391. But see *U. S. R. S.*, § 954; *Ersteih v. Rothschild*, 22 Fed. R. 61; and *infra*, § 361.

<sup>48</sup> *Partridge v. Felix Mut. L. I. Co.*, 15 Wall. 573; *Dushane v. Benedict*, 120 U. S. 630; *Charnley v. Sibley* (C. C. A.), 73 Fed. R. 980. But not of equitable set-off. *Scott v. Armstrong*, 146 U. S. 499.

<sup>49</sup> *Harris v. Hess*, 10 Fed. R. 263. In the absence of statute, interpleader or the bringing in of a new party



argument,<sup>50</sup> time of filing referee's report,<sup>51</sup> discontinuance,<sup>52</sup> opening judgment by default,<sup>53</sup> suspension of judgment pending writ of error.<sup>54</sup>

In following a State statute, the Federal courts usually read the word "county" as "judicial district."<sup>55</sup> A State statute authorizing an action to be brought in a firm name was not followed in an action at common law in the Federal court there held.<sup>56</sup> A State statute allowing an association consisting of seven or more to sue and be sued in the name of one of its officers, was followed at common law in the Federal court sitting in such State,<sup>57</sup> but not in a Federal court sitting in another State.<sup>58</sup>

A State statute providing that a county can be sued only in a specified court;<sup>59</sup> or that a foreign corporation cannot sue until it has complied with certain statutory requirements,<sup>60</sup> or that an action cannot be brought upon a judgment without leave of the court that rendered it,<sup>61</sup> or that a special appearance for the purpose of objection to the jurisdiction is equivalent to a general appearance,<sup>62</sup> or regulating the practice in applying for, and giving the right in certain cases to postponements of trials or to continuances,<sup>63</sup> is not binding on a Federal court.

In criminal actions the Circuit and District Courts follow

cannot be ordered at common law. *Bertha Z. & M. Co. v. Carico*, 61 Fed. R. 132, 136. For the practice in equity, see *supra*, § 88.

<sup>50</sup> *Rosenbach v. Dreyfuss*, 3 Fed. R. 28.

<sup>51</sup> *Parker v. Ogdensburg & L. C. R. Co.*, 79 Fed. R. 817.

<sup>52</sup> *Nussbaum v. Northern Ins. Co.*, 40 Fed. R. 337; *Gassman v. Jarvis*, 94 Fed. R. 603.

<sup>53</sup> *Brown v. Phila., W. & B. R. Co.*, 9 Fed. R. 183. But see *infra*, § 379.

<sup>54</sup> *U. S. v. Sturgis*, 14 Fed. R. 810.

<sup>55</sup> *Lung Chung v. No. Pac. Ry. Co.*, 19 Fed. R. 254, 257; *Treadwell v. Seymour*, 41 Fed. R. 579; *Miller's Adm'r v. Norfolk & W. R. Co.*, 41 Fed. R. 431.

<sup>56</sup> *Adams v. May*, 27 Fed. R. 907.

<sup>57</sup> *Hoey v. Coleman*, 46 Fed. R. 221, 224. See *supra*, § 19.

<sup>58</sup> *Chapman v. Barney*, 120 U. S. 677, 682. See *supra*, § 19.

<sup>59</sup> *Cowles v. Mercer County*, 7 Wall. 118; *Lincoln County v. Luning*, 133 U. S. 529; *Chicot County v. Sherwood*, 148 U. S. 529.

<sup>60</sup> *Bank of British N. A. v. Barling*, 44 Fed. R. 641; affirmed as *Barling v. British Bank of N. A. (C. C. A.)*, 50 Fed. R. 260.

<sup>61</sup> *Phelps v. O'Brien Co.*, 2 Dill. 318; *Union Tr. Co. v. Rochester & P. R. Co.*, 29 Fed. R. 609.

<sup>62</sup> *So. Pac. Co. v. Denton*, 146 U. S. 202, 209. Cf. *Mexican C. Ry. Co. v. Pinckney*, 149 U. S. 194.

<sup>63</sup> *Texas & Pac. Ry. Co. v. Nelson (C. C. A.)*, 50 Fed. R. 418.



the old practice at common law, except in so far as the same has been changed by a Federal statute.<sup>64</sup>

§ 361. **Writs and process in general.**—The Revised Statutes provide that “all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof.”<sup>1</sup> It has been held in the Second Circuit that a rule of State practice which permits an attorney to issue a summons, subpoena, or other process without the seal of the court or the signature of the clerk, will not be followed by the Federal court;<sup>2</sup> and a summons issued without such seal and signature is void, and cannot be cured by amendment.<sup>3</sup>

Writs and process which issue from the Supreme Court or a Circuit Court must bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a District Court must bear teste of the judge of that court or, when that office is vacant, of the clerk thereof.<sup>4</sup> All process must bear teste from the day of its issue.<sup>5</sup> It has been held that a writ with the proper seal, but wrongly tested, may be amended.<sup>6</sup>

The Supreme Court has power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction,<sup>7</sup> and power to issue writs of mandamus to any courts appointed under the authority of the United States; and where a State, public minister, consul, or vice-consul is a party, to persons holding office under the authority of the United States.<sup>8</sup> In cases of which the Supreme Court has original jurisdiction, it may issue any writ used in practice at common law, although there is no statutory authority for the same.<sup>9</sup> The Supreme Court, the Circuit Courts of Appeal, the

<sup>64</sup> U. S. v. Maxwell, 3 Dill. 275; *Contra*, Chamberlain v. Mensing, 47 U. S. v. Nye, 4 Fed. R. 888; U. S. v. Reid, 12 How. (U. S.) 361; Erwin v. U. S., 37 Fed. R. 470, 488.

§ 361. <sup>1</sup> U. S. R. S., § 911. A notice to a garnishee is not process; it may be signed by the marshal; and it need not be signed by the clerk nor bear the seal of the court. Wile v. Cohn, 63 Fed. R. 759. See *supra*, § 360.

<sup>2</sup> Dwight v. Merritt, 4 Fed. R. 614; Peaslee v. Haberstro, 15 Blatchf. 472.

*Contra*, Chamberlain v. Mensing, 47 Fed. R. 435.

<sup>3</sup> Dwight v. Merritt, 4 Fed. R. 614; Peaslee v. Haberstro, 15 Blatchf. 472. *Contra*, Chamberlain v. Mensing, 47 Fed. R. 435.

<sup>4</sup> U. S. R. S., § 911.

<sup>5</sup> U. S. R. S., § 912.

<sup>6</sup> U. S. v. Turner, 50 Fed. R. 784.

<sup>7</sup> U. S. R. S., § 688. See § 362.

<sup>8</sup> U. S. R. S., § 688. See § 363.

<sup>9</sup> Kentucky v. Dennison, 24 How. 66.

Circuit Courts, and the District Courts have power to issue writs of *scire facias*, and all writs, not specifically provided for by statute, which are necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.<sup>10</sup>

The Revised Statutes provide that "No summons, writ, declaration, return process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion, and by its rules, prescribe."<sup>11</sup> Where the State statute permits a writ of attachment to be amended by the addition of a seal, such a writ may be so amended by the Federal Court after a removal.<sup>12</sup>

It has been held that an omission in the papers upon which an attachment has been granted may be supplied by an amendment in a case where the State practice does not permit such an amendment;<sup>13</sup> that pleas verified before the wrong officer may be corrected by amendment and the proper verification

<sup>10</sup> U. S. R. S., § 716; 26 St. at L. 829, § 12. In *Stewart v. Justices of St. Clair Co. Court*, 47 Fed. R. 482, 484, Judge Philippsaid: "By this is meant the mode of process in the State where the United States Circuit Court sits."

<sup>11</sup> U. S. R. S., § 954. See *Parks v. Turner*, 12 How. 39, 46; *Roach v. Hulings*, 16 Pet. 319; *Tilton v. Co-field*, 93 U. S. 163, 167; *Jacob v. U. S.*, Brock. 520, 525; *Rosenbach v. Dreyfuss*, 1 Fed. R. 391; *U. S. v. Batchelder*, 9 Int. Rev. Rec. 98; *Warren v. Moody*, 9 Fed. R. 673; *Thomas v. U. S.*, 15 Ct. Cl. 242; *Russell v. U. S.*, 15

Ct. Cl. 168; *Gulf, C. & S. F. Ry. Co. v. James*, 48 Fed. R. 148, 150; U. S. R. S., §§ 636, 948, 914, 5595, 5596. It has been said that U. S. R. S., § 602, providing for the continuance of all process, pleadings and proceedings during a vacancy, is a remedial statute, to be liberally construed in aid of its general purpose. *U. S. v. Murphy*, 82 Fed. R. 893.

<sup>12</sup> *Wolf v. Cook*, 40 Fed. R. 432.

<sup>13</sup> *Bowden v. Burnham*, 59 Fed. R. 752, 754; *Erstein v. Rothschild*, 22 Fed. R. 61, 64; *Booth v. Denike*, 65 Fed. R. 43; *infra*, § 369.

added on the trial;<sup>14</sup> that an amendment adding to a pleading allegations as to the difference of citizenship between the party may be allowed after judgment;<sup>15</sup> and that, in a suit originally brought in a Federal court, an amendment changing the suit from an action at common law to one in equity cannot be allowed.<sup>16</sup> Amendments are rarely allowed to the plaintiff in penal actions and actions to enforce forfeitures.<sup>17</sup>

The Revised Statutes make it the marshal's duty to execute, throughout the district, all lawful precepts directed to him and issued under the authority of the United States,<sup>18</sup> and give him and all his deputies the same powers as the sheriffs in the same State and their deputies.<sup>19</sup> It has been held at circuit that process, other than subpoenas *ad testificandum*,<sup>20</sup> can only be served by the marshal or his deputy;<sup>21</sup> but that, when the laws of the State give such power to a sheriff, the marshal may appoint a person to serve a particular writ or perform any other special service,<sup>22</sup> and that the blank form of a writ, signed and sealed, may be given by the clerk to an attorney; that the attorney may fill in the writ, in his own handwriting, with the names of the parties, style of action, and date; that the marshal may give the attorney a blank form appointing a deputy in which the attorney may write the name of the process-server; and that when the writ as served is indorsed by an attorney not admitted to practice in the Federal court but qualified for admission, the court may amend it without thereby invalidating the service, by substituting another attorney, or by admitting the attorney to practice in such court.<sup>23</sup> The Supreme Court has said, speaking of the act requiring a con-

<sup>14</sup> *Bank of Edgfield v. Farmers' C. M. Co.*, 52 Fed. R. 98.

<sup>15</sup> *Maddox v. Thorn*, 60 Fed. R. 217.

<sup>16</sup> *Hirsh v. Jones*, 56 Fed. R. 137. See as to removal cases, *infra*, § 891.

<sup>17</sup> *U. S. v. Batchelder*, 9 Int. Rev. Rec. 98.

<sup>18</sup> U. S. R. S., § 787.

<sup>19</sup> U. S. R. S., § 788. Deputy United States marshals in Alaska appointed under the act of May 17, 1884, may execute process issued by United States commissioners exercising the powers of justices' courts according

to the statutes of Oregon. *Holden v. Williams*, 75 Fed. R. 793. See *supra*, § 840.

<sup>20</sup> *Russell v. Ashley*, Hempst. 546; *Miller v. Scott*, 6 Phila. (Pa.) 484; *Schwabacker v. Reilly*, 2 Dill. 127.

<sup>21</sup> *Schwabacker v. Reilly*, 2 Dill. 127. But see *Amy v. Watertown*, 130 U. S. 801, 804; *Hyman v. Chales*, 12 Fed. R. 855; *U. S. v. Jailer of Fayette Co.*, 2 Abb. U. S. 265.

<sup>22</sup> *Hyman v. Chales*, 12 Fed. R. 855.

<sup>23</sup> *Jewett v. Garrett*, 47 Fed. R. 625.

formity with the State practice in actions at common law: "There can be no doubt, we think, that the mode of service of process is within the categories named in the act;"<sup>24</sup> but where the Federal court adopted a rule regulating the service of process in accordance with the then State practice, it was held that service thus made was good although the State practice had subsequently been amended.<sup>25</sup> Where the State practice requires a summons to run in the name of the State, the summons, if properly tested, need not run in the name of the United States.<sup>26</sup> Where a marshal, who had seized goods under a writ of replevin directing him to deliver them to the plaintiff, permitted the plaintiff's agents to pack them, load them into a car and procure a shipping receipt and bill of lading for the same, it was held that the goods had been delivered to the plaintiff and passed out of the custody of the Federal court, so that the State court might attach them.<sup>27</sup>

§ 362. Writs of prohibition.—A writ of prohibition is a writ issuing out of a court of superior jurisdiction, and directed to an inferior court for the purpose of preventing the inferior tribunal from usurping a jurisdiction to which it is not entitled.<sup>1</sup> A writ of prohibition is a civil proceeding even when designed to stop a criminal proceeding.<sup>2</sup>

The Supreme Court has power to issue writs of prohibition to the District Courts of the United States when proceeding as courts of admiralty.<sup>3</sup> In a similar case a writ of prohibition may issue to the District Court of the United States for the District of Alaska.<sup>4</sup> Where the court of admiralty has jurisdiction of the vessel sued and of the subject-matter, the Supreme

<sup>24</sup> *Amy v. Watertown*, 180 U. S. 301, 304.

<sup>25</sup> *Shepard v. Adams*, 168 U. S. 618.

<sup>26</sup> *Chamberlain v. Mensing*, 47 Fed. R. 435. It has been held that the power of the Federal courts to issue the writ of *capias ad satisfaciendum* is derived from the judiciary and process acts of 1789, and is not affected by the Illinois statute of June 17, 1895. *U. S. v. Arnold* (C. C. A.), 69 Fed. R. 987.

<sup>27</sup> *Animarium Co. v. Bright*, 82 Fed. R. 197.

§ 362. <sup>1</sup> High, Ex. Rem., § 762. The history of the writ of prohibition is well described in a letter by Prof. Theodore W. Dwight to the New York Tribune, published June 29, 1891; and reprinted in the second edition of this work in a note to this section.

<sup>2</sup> *Farnsworth v. Montana*, 129 U. S. 104, 113; *Smith v. Whitney*, 116 U. S. 167.

<sup>3</sup> U. S. R. S., § 688; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610.

<sup>4</sup> *In re Cooper*, 188 U. S. 404.

Court will not interfere to correct an error in the decision,<sup>5</sup> even upon a question as to the validity of a statute.<sup>6</sup> The Supreme Court has no power to issue a writ of prohibition in any other case, except when necessary for the exercise of its jurisdiction in some matter before it;<sup>7</sup> or possibly when an application is made by a State, public minister, or consul.<sup>8</sup>

It is uncertain whether the power of the Circuit Courts of Appeals to issue writs of prohibition extends to any cases except those in which its exercise is necessary for the efficient administration of the particular jurisdiction with which they are invested.<sup>9</sup>

No Circuit or District Court of the United States has the power to issue a writ of prohibition except when necessary for the exercise of its jurisdiction in some matter previously before it.<sup>10</sup>

It seems that the Supreme Court of the District of Columbia has the power to issue writs of prohibition directed to inferior courts and to public boards and officers acting in a given judicial capacity within its territorial jurisdiction.<sup>11</sup> It is doubtful whether any court has the power to issue a writ of prohibition against a court-martial.<sup>12</sup> Where the court against which the writ is sought has clearly no jurisdiction of the suit or prosecution issued before it originally nor of some collateral matter arising therein, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, the writ of prohibition should issue,<sup>13</sup> and a refusal to grant the writ, where all the proceedings appear of record, may be re-

<sup>5</sup> *Ex parte Gordon*, 105 U. S. 515; *Ex parte Hagar*, 104 U. S. 520; *Ex parte Pennsylvania*, 109 U. S. 174; *In re Fassett*, 141 U. S. 479, 484; *In re Engles*, 146 U. S. 357; *In re Morrison*, 147 U. S. 14.

<sup>6</sup> *Ex parte Pennsylvania*, 109 U. S. 174.

<sup>7</sup> *Ex parte Gordon*, 1 Black, 503; *In re Christy*, 3 How. 292; *Ex parte Warmouth*, 17 Wall. 64; *Ex parte Graham*, 10 Wall. 541.

<sup>8</sup> *In re Baiz*, 135 U. S. 403.

<sup>9</sup> *U. S. v. Williams (C. C. A.)*, 67 Fed. R. 384.

<sup>10</sup> U. S. R. S., § 716; *Re Bining*, 7 Blatchf. 159.

<sup>11</sup> See argument of Messrs. Jeff. Chandler and Eppa Houston, in *Smith v. Whitney*, 116 U. S. 167, 173; Act of Feb. 27, 1827, ch. 60, § 2 (19 St. at L. 253); *U. S. v. Schurz*, 102 U. S. 378; *Price v. State*, 8 Gill (Md.), 295, 310.

<sup>12</sup> *Smith v. Whitney*, 116 U. S. 167, 175; *U. S. v. Maney*, 61 Fed. R. 140.

<sup>13</sup> *In re Rice*, 155 U. S. 396; *In re N. Y. & Porto Rico S. S. Co.*, 155 U. S. 523.

viewed by a writ of error.<sup>14</sup> But where there is another remedy, by appeal or otherwise, or where the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the grant or refusal of the writ is discretionary; and it is not obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings.<sup>15</sup>

The usual practice is, upon an application in the name of the United States on the relation of the party aggrieved, for the court to grant a rule to the judge sought to be prohibited, to show cause why the writ should not issue, and to accompany the rule with an order that he proceed no further in the case till the decision of the Supreme Court in the premises.<sup>16</sup> It has been said that when the suit complained of is brought by a private person he may be joined as a defendant; but that when it is a suit or prosecution on behalf of the government the writ of prohibition can go to the court only.<sup>17</sup> The proceedings of a court-martial cannot be prohibited by such a writ addressed to an officer who ordered the court-martial to convene, but is not himself a member of it.<sup>18</sup> The application for the writ should be supported by an affidavit where the motion for the writ of prohibition is founded upon matter not appearing upon the face of the proceeding below.<sup>19</sup> It is the duty of the respondent to produce any evidence that exists to countervail the petitioner's proof of such new matter.<sup>20</sup>

The writ of prohibition cannot be used to correct errors of a court in deciding matters of law or fact within its jurisdiction,<sup>21</sup> or to undo what has been done.<sup>22</sup> "The only effect of the writ is to suspend all action, and to prevent any further proceeding in the prohibited direction."<sup>23</sup>

<sup>14</sup> *Smith v. Whitney*, 116 U. S. 167, 173.

<sup>15</sup> *In re Rice*, 155 U. S. 396; *In re N. Y. & Porto Rico S. S. Co.*, 155 U. S. 523; *In re Cooper*, 148 U. S. 472, 495; *Am. Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379.

<sup>16</sup> *U. S. v. Hoffman*, 4 Wall. 158.

<sup>17</sup> *Smith v. Whitney*, 116 U. S. 167, 176, per Gray, J.

<sup>18</sup> *Ibid.*

<sup>19</sup> *In re Baiz*, 185 U. S. 403, 430, per Fuller, C. J.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Smith v. Whitney*, 116 U. S. 167, 176.

<sup>22</sup> *U. S. v. Hoffman*, 4 Wall. 158.

<sup>23</sup> *Ibid.*



§ 363. **Mandamus.**—The writ of mandamus is a command issuing in the name of the United States directed to a person, corporation, or inferior court within its jurisdiction, requiring it so do some particular thing therein specified, which pertains to its office or duty, and which the court issuing the writ determines to be its duty.<sup>1</sup>

The Supreme Court has power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States;<sup>2</sup> or where a State or an ambassador, or other public minister, or a consul or vice-consul is a party, to persons holding office under the authority of the United States.<sup>3</sup> The Constitution prohibits the grant to that court of any further original jurisdiction to issue writs of mandamus to officers of the United States.<sup>4</sup> The constitutionality of the grant to the Supreme Court of power to issue writs of mandamus to other courts of the United States has been upheld on the ground that such a writ is in the nature of appellate jurisdiction.<sup>5</sup>

A mandamus will issue to compel a court to exercise its discretion in one way or another.<sup>6</sup> A mandamus will issue to compel a court to proceed in a case which it has dismissed for want of jurisdiction, when the record before the lower court showed its jurisdiction, and there is no review by appeal or writ of error;<sup>7</sup> but not when through mistake a paper showing the jurisdiction was not in the record and before the court.<sup>8</sup> After a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and judgment in favor of the plea and for a dismissal of the action, the plaintiff

§ 363. <sup>1</sup> *Ex parte Crane*, 5 Pet. 189, 190.

<sup>2</sup> U. S. R. S., § 688; *In re Green*, 141 U. S. 325.

<sup>3</sup> U. S. R. S., § 688. See *Kentucky v. Dennison*, 23 How. 286; *Virginia v. Rives*, 100 U. S. 813, 816; *In re Baiz*, 135 U. S. 403; *Virginia v. Paul*, 148 U. S. 107.

<sup>4</sup> *Marbury v. Madison*, 1 Cranch, 137.

<sup>5</sup> *Ex parte Crane*, 5 Pet. 189, 190.

<sup>6</sup> *Ex parte Crane*, 5 Pet. 189, 190; *Ex parte Morgan*, 114 U. S. 174; *Ex*

*parte Parker*, 120 U. S. 737; *In re Hohorst*, 150 U. S. 653.

<sup>7</sup> *Insurance Co. v. Comstock*, 16 Wall. 258; *Railroad Co. v. Wiswall*, 23 Wall. 507; *Hoadley v. San Francisco*, 94 U. S. 4; *Ex parte Schollenberger*, 96 U. S. 359; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566; *Hollon Parker, Petitioner*, 131 U. S. 221. But see *In re Burdett*, 127 U. S. 771; *In re Pennsylvania Co.*, 137 U. S. 451, 453.

<sup>8</sup> *In re Sherman*, 124 U. S. 364.

is confined to his remedy by writ of error, and cannot by mandamus compel the inferior court to take jurisdiction of his case.<sup>9</sup> The writ of mandamus has been granted to compel a District Judge of the United States to order the marshal to deliver to the county jailer certain prisoners convicted under indictments, or other criminal proceedings, illegally removed to the Circuit Court of the United States;<sup>10</sup> to compel the allowance of an appeal,<sup>11</sup> provided the applicant was a party to the suit;<sup>12</sup> to compel a judge to settle a bill of exceptions and to sign the same after it had been settled by him,<sup>13</sup> but not to sign a bill of exceptions which he considered did not state correctly the proceedings before him;<sup>14</sup> to compel a court to proceed in a suit which it had improperly stayed;<sup>15</sup> to take jurisdiction of a writ of *scire facias* which it had improperly quashed;<sup>16</sup> to compel a court to proceed to judgment,<sup>17</sup> and when the act of signing the judgment was purely ministerial, to sign the same;<sup>18</sup> to execute a judgment it had rendered;<sup>19</sup> to execute a previous mandate of the Supreme Court;<sup>20</sup> and to compel the reinstatement in a court of the United States or of the District of Columbia of an attorney who had been disbarred, in a case of which the court had no jurisdiction or acted with flagrant impropriety.<sup>21</sup>

<sup>9</sup> *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566; *Ex parte Railway Co.*, 103 U. S. 794; *In re Pennsylvania Co.*, 137 U. S. 451, 453.

<sup>10</sup> *Virginia v. Rives*, 100 U. S. 818, 823, 829; *Virginia v. Paul*, 148 U. S. 107.

<sup>11</sup> *Ex parte Jordan*, 94 U. S. 248; *Ex parte Railroad Co.*, 95 U. S. 221; *Vigo's Case*, 21 Wall. 648. But it was said that the writ may be denied where the order appealed from was wholly discretionary, or where the discretion was properly exercised. *Lewis v. Baltimore & L. R. Co. (C. C. A.)*, 62 Fed. R. 218.

<sup>12</sup> *Ex parte Cutting*, 94 U. S. 14.

<sup>13</sup> *Chateaugay O. & L. Co., Petitioner*, 128 U. S. 544. See *Ex parte Crane*, 5 Pet. 189, 190.

<sup>14</sup> *Ex parte Bradstreet*, 4 Pet. 102.

<sup>15</sup> *Livingston v. Dorgenois*, 7

*Cranch*, 577. But see *Ex parte Bradstreet*, 8 Pet. 588.

<sup>16</sup> *In re Connaway*, 178 U. S. 421.

<sup>17</sup> *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571.

<sup>18</sup> *Ex parte Bradstreet*, 6 Pet. 774; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291; *Ex parte Many*, 14 How. 24. But see *Ex parte Morgan*, 114 U. S. 178.

<sup>19</sup> *U. S. v. Peters*, 5 Cranch, 115; *Stafford v. Union Bank*, 16 How. 135.

<sup>20</sup> *White v. U. S.*, 1 Black, 501; *U. S. v. Fossatt*, 21 How. 445; *Ex parte Dubuque & P. R. Co.*, 1 Wall. 69; *In re Washington & G. R. Co.*, 140 U. S. 91; *infra*, § 495. But see *Ex parte Railway Co.*, 101 U. S. 711; *In re Humeson*, 149 U. S. 192.

<sup>21</sup> *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 506. But see *Ex parte Burr*, 9 Wheat. 529; *Ex*



A mandamus will not be issued when there is any other appropriate relief,<sup>22</sup> —as, for example, by writ of error or appeal,<sup>23</sup> nor to control the exercise of discretion,<sup>24</sup> except, possibly, in case of a very flagrant abuse of discretion.<sup>25</sup> The writ of mandamus has been denied when asked to compel a court to allow or refuse an amendment of a pleading,<sup>26</sup> to order the withdrawal of a plea,<sup>27</sup> to allow the filing of double pleas,<sup>28</sup> at the application of a private individual to remand a civil case after a motion for a remand had been denied by the Circuit Court,<sup>29</sup> to retain jurisdiction of a case which had been remanded to the State court since the act of March 3, 1887,<sup>30</sup> to vacate interlocutory orders which do not terminate the suit,<sup>31</sup> to vacate a preliminary injunction,<sup>32</sup> to vacate an order setting aside a nonsuit,<sup>33</sup> to open a default,<sup>34</sup> to quash a writ of execution,<sup>35</sup> to admit a prisoner to bail,<sup>36</sup> to diminish the amount of bail required for a prisoner's discharge,<sup>37</sup> to approve a bond,<sup>38</sup> to grant a rehearing,<sup>39</sup> to receive further proofs on an appeal in admiralty,<sup>40</sup> to vacate an order directing a district attorney and a marshal to deliver the official books of record to persons ap-

parte Secombe, 19 How. 9; *Ex parte* Wall, 107 U. S. 265; *In re* Green, 141 U. S. 325.

<sup>22</sup> *Bank of Columbia v. Sweeny*, 1 Pet. 567; U. S. v. Addison, 22 How. 174; *Ex parte* Newman, 14 Wall. 152; *In re* Morrison, 147 U. S. 14, 26.

<sup>23</sup> *Ex parte* Newman, 14 Wall. 152; *Ex parte* Baltimore & O. R. Co., 108 U. S. 566; *Ex parte* Brown, 116 U. S. 401; *Connecticut Mut. L. Ins. Co., Petitioner*, 131 U. S. App. clxxxix; *In re* Morrison, 147 U. S. 14, 26; *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379.

<sup>24</sup> *Ex parte* Railway Co., 101 U. S. 711; *Ex parte* Roberts, 6 Pet. 216; *Ex parte* Davenport, 6 Pet. 661; *Ex parte* Bradstreet, 7 Pet. 634; *Ex parte* Bradstreet, 4 Pet. 182; *Ex parte* Bradstreet, 8 Pet. 588; *Ex parte* Milwaukee R. Co., 5 Wall. 186; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291.

<sup>25</sup> *Ex parte* Bradley, 7 Wall. 364.

<sup>26</sup> *Ex parte* Bradstreet, 7 Pet. 634.

<sup>27</sup> *Ex parte* Sweeny, 1 Pet. 567.

<sup>28</sup> *Ex parte* Davenport, 6 Pet. 661.

<sup>29</sup> *Ex parte* Hoad, 105 U. S. 578; *Ex parte* Dancel, 181 U. S. —. But see *In re* Baiz, 135 U. S. 403; *Virginia v. Rives*, 100 U. S. 313, 316; *Virginia v. Paul*, 148 U. S. 107.

<sup>30</sup> *In re* Pennsylvania Co., 137 U. S. 451, 453.

<sup>31</sup> *Ex parte* Hoyt, 13 Pet. 279; *Ex parte* Whitney, 13 Pet. 404; *Gain v. Relf*, 15 Pet. 9; *Ex parte* Perry, 102 U. S. 183; *Ex parte* Schwab, 98 U. S. 240; *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379.

<sup>32</sup> *Ex parte* Schwab, 98 U. S. 240.

<sup>33</sup> *Ex parte* Loring, 94 U. S. 418.

<sup>34</sup> *Ex parte* Roberts, 6 Pet. 216.

<sup>35</sup> U. S. ex rel. Harless v. Judges (C. C. A.), 85 Fed. R. 178.

<sup>36</sup> *Ex parte* Flippin, 94 U. S. 348.

<sup>37</sup> *Ex parte* Taylor, 14 How. 8.

<sup>38</sup> *Ex parte* Milwaukee R. Co., 5 Wall. 188.

<sup>39</sup> U. S. v. Bullock, 6 Pet. 485, note.

<sup>40</sup> *In re* Hawkins, 147 U. S. 486.

pointed by the President as their successors, whose title they disputed,<sup>41</sup> and to transmit a particular specified paper with the transcript of the record.<sup>42</sup>

It is not the office of a mandamus to direct a court to decide in a particular way the matter before it,<sup>43</sup> even when there is no remedy by writ of error or appeal.<sup>44</sup> As a general rule a writ of mandamus will not issue when there is any other adequate remedy for the relator.<sup>45</sup>

The Circuit Courts of Appeal have the power to issue writs of mandamus which are ancillary to cases over which they have appellate jurisdiction.<sup>46</sup> Such a court has no power to compel a Circuit or District Court to take jurisdiction of a cause,<sup>47</sup> or to dismiss a case for want of jurisdiction.<sup>48</sup>

The Circuit Courts of the United States have power to issue a mandamus, upon motion of the Attorney-General or any district attorney of the United States, to compel any officer of the United States to file the bonds, make returns, and perform any other duties required by chapter 95 of laws passed at the Second Session of the Forty-third Congress, relating to costs and fees;<sup>49</sup> and to compel the Union Pacific Railroad Company to operate its road as required by law.<sup>50</sup> The Circuit and the District Courts of the United States have the power to issue a writ of mandamus to compel compliance with the provisions of the Interstate Commerce Act.<sup>51</sup> Otherwise those courts have no power to issue a writ of mandamus, except when necessary for and ancillary to the exercise of their respective jurisdiction in another matter.<sup>52</sup> A Circuit Court cannot by removal acquire

<sup>41</sup> *In re Parsons*, 150 U. S. 150.

<sup>42</sup> *Starcke v. Klein* (C. C. A.), 62 Fed. R. 502. The proper remedy seems to be a *certiorari* for a diminution of the record. See *infra*, § 365.

<sup>43</sup> *In re Morrison*, 147 U. S. 1, 26.

<sup>44</sup> *In re Rice*, 155 U. S. 396.

<sup>45</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 453.

<sup>46</sup> 26 St. at L. 829; *Smith v. Jackson*, 1 Paine, 453; *The New England*, 8 Sumn. 495; *The Enterprise*, 3 Wall. Jr. 58; *Ex parte Hoyt*, 13 Pet. 279.

<sup>47</sup> *U. S. ex rel. Mudsill Min. Co. v. Swan* (C. C. A.), 65 Fed. R. 647.

<sup>48</sup> *U. S. v. Severens* (C. C. A.), 71 Fed. R. 768.

<sup>49</sup> 18 St. at L. 833.

<sup>50</sup> 17 St. at L. 509, § 4; *U. S. v. U. P. R. Co.*, 2 Dill. 527; *U. P. R. Co. v. Hall*, 91 U. S. 348. It seems that the corporation may be thus compelled to operate its telegraph lines by itself alone through its own corporate officers. *Union Pac. Ry. Co. v. U. S.*, 59 Fed. R. 813, 833.

<sup>51</sup> 25 St. at L. 862, § 10. See *U. S. v. Delaware, L. & W. R. Co.*, 40 Fed. R. 101, 105.

<sup>52</sup> *U. S. R. S.*, § 716; *McIntire v. Wood*, 7 Cranch, 504; *McClung v.*

jurisdiction to grant a mandamus in a case where it could not do so upon an application originally addressed to it.<sup>53</sup>

The most frequent instances in which writs of mandamus are issued by the Circuit Courts of the United States are to compel the levy of taxes by officers of municipal or other public corporations to satisfy judgments previously obtained in the courts which issue the writs.<sup>54</sup> The writ will not issue to compel such an officer to perform a duty not imposed upon him by the law of the State under which he was appointed.<sup>55</sup> When the statute authorized a city council to levy a tax to pay a funded debt "if it believe that the public good and the best interests of the city require," a mandamus was issued after judgment to compel the levy of the tax.<sup>56</sup> A repeal of the State statute authorizing the officer to levy the tax does not divest the power of the Federal court to compel him to do so by mandamus, after a judgment upon a contract made before the repeal.<sup>57</sup> When

Silliman, 6 Wheat. 598; *Graham v. Norton*, 15 Wall. 427; *Bath County v. Amy*, 13 Wall. 244; *County of Greene v. Daniel*, 102 U. S. 187; *Davenport v. County of Dodge*, 105 U. S. 237; *Louisiana v. Jumel*, 107 U. S. 711, 727; *Gares v. N. W. Nat. Bldg., L. & I. Ass'n*, 55 Fed. R. 209. An application to a United States District Court by a receiver appointed in supplementary proceedings by a State court, seeking a writ of mandamus to require the clerk of the District Court to pay a fund in the registry of that court to the receiver, is an original proceeding, and the court has no power to grant the writ. *In re Forsyth*, 78 Fed. R. 296. Before the Evarts Act of March 3, 1891, a Circuit Court could, as ancillary to a case of which it had appellate jurisdiction, issue a writ of mandamus to a District Court of the United States. *Smith v. Jackson*, 1 Paine, 455; *The New England*, 3 Sumner, 495; *The Enterprise*, 3 Wall. Jr. 58; *Ex parte Jesse Hoyt*, 13 Pet. 279.

<sup>53</sup> *Indiana ex rel. Muncie v. L. E. & W. R. Co.*, 85 Fed. R. 1. *Contra*, *State ex rel. Postal Tel. Cable Co. v. Del. &*

*A. Tel. & T. Co.*, 47 Fed. R. 633; *People v. Colorado C. R. Co.*, 42 Fed. R. 638, 640.

<sup>54</sup> *Riggs v. Johnson County*, 6 Wall. 166; *Davies v. Corbin*, 112 U. S. 36; *Commissioners v. Aspinwall*, 24 How. 376; *Supervisors v. U. S.*, 4 Wall. 435; *Weber v. Lee County*, 6 Wall. 210; *U. S. v. New Orleans*, 98 U. S. 381. But see *Board of Com'rs of Grand County v. King* (C. C. A.), 54 Fed. R. 202. For a case where the county justices were imprisoned for contempt because of their disobedience to such a writ, see *In re Copenhaver*, 54 Fed. R. 660.

<sup>55</sup> *U. S. v. Macon County*, 99 U. S. 582; *U. S. v. Labette County*, 7 Fed. R. 318; *U. S. v. County of Clark*, 95 U. S. 769; *Memphis v. U. S.*, 97 U. S. 293; *Brownsville v. Loague*, 129 U. S. 493. *Cf.* *Hicks v. Cleveland* (C. C. A.), 106 Fed. R. 459; *Padgett v. Post* (C. C. A.), 106 Fed. R. 600; *Little Rock v. U. S. ex rel. Howard* (C. C. A.), 103 Fed. R. 418.

<sup>56</sup> *Galena v. Amy*, 5 Wall. 705.

<sup>57</sup> *Wolff v. New Orleans*, 103 U. S. 358; *Von Hoffman v. Quincy*, 4 Wall. 535.

the charter of the municipal corporation has been repealed and its corporate existence extinguished, no such mandamus can be granted.<sup>58</sup> A mandamus to compel the levy of a tax cannot be issued until after a judgment has been obtained.<sup>59</sup> It has been held that an action will lie to obtain a special judgment which will not warrant the issue of an execution and can only be enforced by a mandamus, although in the State court the only remedy could be an original mandamus.<sup>60</sup>

A mandamus was granted to compel the transfer of stock in a corporation to the buyer of the same at a sale under an execution issued by the same court.<sup>61</sup> A Circuit Court has no jurisdiction to compel a postmaster by mandamus to transmit mail matter at a lower rate of postage than that charged,<sup>62</sup> nor to compel a collector to examine into the facts as to the validity of a claim to a trade-mark affecting importations.<sup>63</sup>

A State court cannot issue a mandamus against an officer of the United States to compel the performance of a duty of his Federal office.<sup>64</sup> The only courts which have any original jurisdiction to issue such a writ against an officer of the United States, in the absence of special statute, and where neither a State, nor an ambassador or other public minister, nor a consul or vice-consul is a party, are the Supreme Court of the District of Columbia,<sup>65</sup> and, when authorized by statute, a Territorial court.<sup>66</sup> A State court cannot by injunction or otherwise interfere with the issue of a mandamus by a Federal court.<sup>67</sup>

<sup>58</sup> *Meriwether v. Garrett*, 102 U. S. 472; *Barkley v. Levee Com'rs*, 98 U. S. 258. But see *U. S. v. Port of Mobile*, 12 Fed. R. 768. For the power of the court to appoint a receiver in such a case, see *supra*, § 244.

<sup>59</sup> *Rosenbaum v. Bauer*, 120 U. S. 450, and cases cited.

<sup>60</sup> *Aylesworth v. Gratiot County*, 48 Fed. R. 350, 352. "Where the plaintiff is otherwise entitled to relief in this court, he will not be debarred therefrom by reason of the fact that his remedy in the State court upon the same cause of action would be of a character which we are not entitled to administer here." *Ibid.* See *Jor-*

*dan v. Cass County*, 8 Dillon, 185; *Davenport v. County of Dodge*, 105 U. S. 237.

<sup>61</sup> *Hair v. Burnell*, 106 Fed. R. 280.

<sup>62</sup> *U. S. v. Pearson*, 24 Blatchf. 453.

<sup>63</sup> *In re Vintschger*, 50 Fed. R. 459.

<sup>64</sup> *McClung v. Silliman*, 6 Wheat. 598.

<sup>65</sup> *Kendall v. U. S.*, 12 Pet. 524; *U. S. v. Schurz*, 102 U. S. 378. See *U. S. v. Guthrie*, 17 How. 284; *infra*, § 363a.

<sup>66</sup> *Clough v. Curtis*, 134 U. S. 361. It has been held that the District Court of Alaska may issue a mandamus to compel a commissioner of that Territory to proceed in a cause, *Finn v. Hoyt*, 52 Fed. R. 83; and that man-

<sup>67</sup> *U. S. v. King*, 74 Fed. R. 493; *Clapp v. Otoe County (C. C. A.)*, 104 Fed. R. 473.

**§ 363a. Jurisdiction of the Supreme Court of the District of Columbia to issue a writ of mandamus to an officer of the United States.**—The Supreme Court of the District of Columbia has the power to issue the writ of mandamus, in cases in which the relator is by common law entitled to seek relief, to an officer of the United States or other person within its territorial jurisdiction.<sup>1</sup> The writ will not issue in a case where its effect would be to direct or control the head of an executive department in the exercise of judgment or discretion, even when in the exercise of his discretion the officer has been called upon to interpret several statutes of doubtful meaning and he has made an erroneous interpretation of the same;<sup>2</sup> but when the

damus should not issue to compel a commission with *quasi-judicial* functions to enroll an applicant as a member of a tribe. *Kimberlin v. Commission to Five Indian Tribes* (C. C. A.), 104 Fed. R. 658.

§ 363a. <sup>1</sup> 9 St. at L. 253; *U. S. v. Schurz*, 102 U. S. 378, 394; *Kendall v. U. S.*, 12 Pet. 524; *Decatur v. Paulding*, 14 Pet. 497; *Kendall v. Stokes*, 3 How. 87; *Com'r of Patents v. Whiteley*, 4 Wall. 522; *U. S. ex rel. Miller v. Black*, 128 U. S. 40, 50; *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636; *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 806; *Roberts v. U. S.*, 176 U. S. 221.

<sup>2</sup> Congress on March 3, 1837, passed an act giving a pension to the widow of any officer who had died in the naval service. On the same day Congress passed a resolution granting a pension to the widow of Stephen Decatur for a certain period of time. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the special pension granted by that as well. The Secretary of the Navy, acting under the opinion of the Attorney-General, decided that she could not have both. Upon her application for a mandamus to compel

the Secretary to grant her a special pension, the writ was denied. *Decatur v. Paulding*, 14 Pet. 497, 515, 516, per Taney, C. J. An application for a mandamus against the Secretary of the Navy by a commander in the navy of the Republic of Texas, for pay alleged to be due him from the United States since the annexation of Texas under the joint resolutions for annexation of Texas, was denied. *Brashear v. Mason*, 6 How. 92. An application for a mandamus to the Secretary of the Treasury to compel the payment of a salary to a Territorial judge for the unexpired term of his office, from which he claimed that he had been improperly removed by the President, was denied. *U. S. ex rel. Goodrich v. Guthrie*, 17 How. 284, 303, 305. An application for a mandamus to compel the Commissioner of Patents to refer an application for a re-issue, which he had decided did not come within the statute, to "the proper examiner, or otherwise examine or cause the same to be examined according to law," was denied. *Com'r of Patents v. Whiteley*, 4 Wall. 522. Neither an injunction will issue to prevent, nor a mandamus issue to compel, the cancellation of an entry in the Land Office under which a claim is made

officer refuses to act at all in a case where he is bound to act,<sup>3</sup> or when by special statute or otherwise a purely ministerial duty, which he is bound to perform without question, is imposed upon a public officer, even the head of an executive de-

to lands. *Gaines v. Thompson*, 7 Wall. 347. See also *Sioux City & St. P. R. Co. v. U. S.*, 36 Fed. R. 610, 612.

Where the Commissioner of the Land Office had decided that a patent should not issue, in a case where numerous questions of law and fact arose, some of them depending upon parole proof, and where the exercise of judicial functions, some of them of a high character, was required, an application for a writ of mandamus was refused. *U. S. v. Commissioner*, 5 Wall. 563, 565. Where the Commissioner of Pensions had decided upon an application for an increase of a pension, that the applicant was not entitled to the same, and this decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate given to the pensioner, it was held that no mandamus would issue to compel an increase of the pension. *U. S. ex rel. Dunlap v. Black*, 128 U. S. 40, 48. Mitchell furnished material and performed labor for the United States under a contract; and when the work was done and the materials furnished he presented his account to the proper officer for adjustment and settlement. The balance was found to be correct so far as the labor and material were concerned, but it was also found that through penalties and forfeitures that balance was liable to be materially reduced. It also appeared that Mitchell was indebted to contractors and others in a large amount

for work done and materials furnished under the contract. The Treasury officials agreed with Mitchell that this account should be adjusted, if he would consent that his said indebtedness should be paid out of the sum so allowed, and that the control of the money should not be given up until those claims were satisfied. He assented, and a draft was prepared accordingly. Mitchell failed to satisfy the claims, and the assignee of his claim to the draft applied for a mandamus to compel the Secretary of the Treasury to deliver the draft to him before he had made the agreed payments, but the application was denied. *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636. So where the Secretary of the Interior had granted a land patent in pursuance of an act of Congress, it was held that the courts could not review his proceedings by mandamus upon the application of a claimant to the land who contended that the statute was unconstitutional. *In re Emblen*, 161 U. S. 52. An application for a mandamus to compel the Secretary of State to pay a certain award under the Mexican Claims Commission, under the act of June 18, 1878, was denied. *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306. See also *U. S. ex rel. Angarica v. Bayard*, 127 U. S. 251, 259; *Frelinghuysen v. Key*, 110 U. S. 63. The writ of mandamus to the Secretary of the Treasury is not a legal remedy to try the title of the relator to an office claimed by him. *U. S. ex rel. Good-*

<sup>3</sup> *U. S. ex rel. Dunlap v. Black*, 128 U. S. 40, 48; *U. S. v. Schurz*, 102 U. S. 878; *U. S. ex rel. Redfield v. Windom*,

137 U. S. 636, 644; *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306, 319; *U. S. v. Lamar*, 116 U. S. 423; *infra*, note 4.



partment, a mandamus may be issued to compel him to do such duty, if there is no other adequate remedy.<sup>4</sup> A mandamus may issue to compel the Treasurer to pay a judgment of the

*rich v. Guthrie*, 17 How. 284, 805. But upon a writ of error to the Supreme Court of the Territory of New Mexico it was held that in case of a disputed election to a municipal office, mandamus may issue to compel the recognition by another municipal officer of the *de facto* officer, whose title is disputed, until the rights of the parties can be determined on *quo warranto*. *In re Delgado*, 140 U. S. 586, 590. See also *U. S. ex rel. International Contracting Co. v. Lamont*, 155 U. S. 803; *U. S. ex rel. Mutual Messenger Co. v. Wright*, 15 App. D. C. 463.

<sup>4</sup>*Stockton & Stokes*, mail contractors, had certain claims against the government for extra services, which they insisted should be granted in their accounts, and a controversy arose as to this between them and the Post-office Department. Congress passed an act for their relief; by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon full examination of all the evidence might seem to be equitable and right; and the Postmaster-General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after investigation, made his report, and stated the sums due to *Stockton & Stokes* on the claims made by them. but the Postmaster-General refused to give them credit as directed by the law. This, the court held he could be compelled to do by a mandamus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. *Kendall v. U. S. ex rel. Stokes*, 12 Pet. 524, 613, 614.

*McBride* claimed a patent for land under a right of pre-emption. The regular proceedings had taken place in the Department of the Interior; the right of the applicant had been affirmed; the patent had been made out in the Land Office, signed by the President, sealed with the Land Office seal, countersigned by the Recorder of the Land Office, recorded in the proper book, and transmitted to the local land officers for delivery; but delivery had been refused, because instructions had been received from the Commissioner to return the patent. Upon an application for a mandamus, the defense was that it had been discovered that the land belonged to a town site. The court held that this defense was insufficient; that the title had passed to the applicant; that he was entitled to the patent subject to any equity which other parties might have to the land, or subject to a proceeding to set the patent aside; and that the duty of the Commissioner and of the Secretary of the Interior had become a mere ministerial duty to deliver the instrument. A mandamus was granted accordingly. *U. S. v. Schurz*, 102 U. S. 878.

Upon an application for a patent in the case of interference, the Commissioner of Patents had decided in favor of *Gill*, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the Secretary of the Interior, and he reversed the decision of the Commissioner. The latter for that reason refused to issue a patent. Upon an application for a mandamus, the Supreme Court held that no appeal lay from the decision of the Commissioner to the Secretary of the Interior; that "the latter officer had no

Court of Claims.<sup>5</sup> No mandamus will issue to enforce specific performance of a contract with the United States which has been repudiated by an act of Congress.<sup>6</sup>

The writ of mandamus issues to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act.<sup>7</sup> There are cases in which the writ of mandamus will not be issued to compel the performance of even a purely ministerial act. "In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake."<sup>8</sup> A mandamus will not issue in a case of doubtful right.<sup>9</sup> A mandamus will not issue in a case where the relator has another adequate remedy, and the grant of the writ may affect the rights of per-

jurisdiction in the matter;" that the patent ought to be issued to Gill's assigns in accordance with the decision of the Commissioner. A mandamus to compel the issue of such a patent was granted accordingly. *Butterworth v. Hoe*, 112 U. S. 50. The Commissioner of Pensions had refused to grant an application for an increase of a pension. The applicant appealed to the Secretary of the Interior, who overruled the decision of the Commissioner, and held that the applicant was entitled to an increase of his pension. The Commissioner refused to carry out the Secretary's decision and to grant the increase requested. It was held that the Commissioner could be compelled by a mandamus to grant the increase of the pension for which the application had been made, in accordance with the decision of the Secretary of the Interior. *U. S. ex rel. Dunlap v. Black*, 128 U. S. 40, 50, 52, per Bradley, J. See also *U. S. ex rel. Hufty v. Trimble*, 14 App. D. C. 414.

<sup>5</sup> *Roberts v. U. S.*, 176 U. S. 221. There is a dictum by Mr. Justice Daniel to the effect that no mandamus will issue "to command the withdrawal of a sum or sums of

money from the Treasury of the United States to be applied in satisfaction of disputed or controverted claims against the United States." *U. S. ex rel. Goodrich v. Guthrie*, 17 How. 284, 303, per Daniel, J. In an English case, Lord Chief Justice Denman said: "If, as has been suggested, it should on any occasion be unsafe with reference to the public service to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the Lords Commissioners would be bound to apply the money to particular purposes of a more pressing nature." *The King v. The Lord Com'rs of the Treasury*, 4 Ad. & El. 286, 295; cited by Lamar, J., in *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, 644.

<sup>6</sup> *U. S. ex rel. Levey v. Stockslager*, 129 U. S. 470, 478.

<sup>7</sup> *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306, 319; *Brownsville v. Loague*, 129 U. S. 493, 501.

<sup>8</sup> *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, 644, per Lamar, J., citing *U. S. v. Schurz*, 102 U. S. 378.

<sup>9</sup> *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, 644, per Lamar, J., citing *Life & Fire Ins. Co. v. Wilson's Heirs*, 8 Pet. 291, 302.



sons who are not parties to the proceeding, or where it will be attended with manifest hardship and difficulties.<sup>10</sup> It has been held that in a case where the application is not made by a person claiming a beneficial interest in sustaining or defeating a bill, no court should interfere by mandamus to correct the record of a legislative body,<sup>11</sup> and that the Governor of a State cannot be compelled by mandamus to return a fugitive from labor or justice.<sup>12</sup>

§ 364. **Practice on application for mandamus.**—In the Supreme Court of the United States, the usual practice on an application for a mandamus is to issue a rule addressed to the judge or judges of the lower court calling on him to show cause why the writ should not issue against him.<sup>1</sup> The rule may also be addressed to the lower court itself.<sup>2</sup> The rule is only issued upon a petition verified by affidavit, showing an apparent right to the writ.<sup>3</sup> The party at whose relation the writ is issued must show an interest in the relief sought;<sup>4</sup> and should allege his citizenship.<sup>5</sup> He is not obliged to obtain the intervention of the Attorney-General or a district attorney.<sup>6</sup> It is the safer practice to move *ex parte* for leave to file the petition.<sup>7</sup> The return cannot be amended on the motion of a person to whom the writ is not addressed.<sup>8</sup>

It has been held that, in a Circuit Court of the United States, upon an application based upon a statute of the United States, the State practice should not be followed, but that the practice

<sup>10</sup> U. S. *ex rel.* Redfield v. Windom, 137 U. S. 636, 634, per Lamar, J., citing *People v. Forquer*, Breese (1 Ill.), 68 (2d ed. 104); *Van Rensselaer v. Sheriff of Albany*, 1 Cowen (N. Y.), 501, 512; *Oaks v. Hill*, 8 Pick. (Mass.) 46. See U. S. v. Com'rs, 5 Wall. 563.

<sup>11</sup> *Clough v. Curtis*, 134 U. S. 361.

<sup>12</sup> *Kentucky v. Dennison*, 24 How. 61.

§ 364. <sup>1</sup> *Postmaster-General v. Trigg*, 11 Pet. 173; *Ex parte Poultney v. La Fayette*, 12 Pet. 472; *Ex parte Schollenberger*, 96 U. S. 369.

<sup>2</sup> *Hollon Parker, Petitioner*, 131 U. S. 221.

<sup>3</sup> *Poultney v. La Fayette*, 12 Pet. 472; *Ex parte Taylor*, 14 How. 8;

*Postmaster-General v. Trigg*, 11 Pet. 173.

<sup>4</sup> *Ex parte Fleming*, 2 Wall. 759; *Clough v. Curtis*, 134 U. S. 361; *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638.

<sup>5</sup> *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638, 641.

<sup>6</sup> *U. P. R. Co. v. Hall*, 91 U. S. 343; *s. c.* as *Hall v. Union P. R. Co.*, 3 Dill. 515; *U. S. v. U. P. R. Co.*, 91 U. S. 72.

<sup>7</sup> *Georgia v. Grant*, 6 Wall. 241; *Farmers' L. & Tr. Co., Petitioner*, 129 U. S. 206.

<sup>8</sup> *Ex parte Harmon*, 131 U. S., Appendix, lxvii.

remains substantially as at common law.<sup>9</sup> It is, however, safer to comply also with the regulations of the State practice.<sup>10</sup> Where mandamus is sought to compel the payment of a judgment against a municipal corporation, performance should be first made of all conditions precedent required by State statutes, such as the issue of an execution and its return unsatisfied,<sup>11</sup> and service of the judgment upon such officers as the State statute requires.<sup>12</sup> It seems that a formal demand for payment of the judgment is, except when the statutes of the State require it, not a condition precedent to the issue of the writ.<sup>13</sup> It has been held that a mandamus will not issue to enforce a judgment after the judgment has become dormant according to the State law through the lapse of time, and no execution can issue thereunder.<sup>14</sup> A State statute forbidding a mandamus to enforce a judgment against a municipal corporation has been held not to deprive the Federal court of jurisdiction.<sup>15</sup> The application for a mandamus should be by a verified petition, which may be also termed an information or complaint.<sup>16</sup> Such petition should state the citizenship of the petitioner.<sup>17</sup> A peremptory writ should not be issued without notice of the application.<sup>18</sup> The alternative writ should state the averments of title or right which form the inducement of the writ, and

<sup>9</sup> *U. S. v. U. P. R. Co.*, 2 Dill. 527.

<sup>10</sup> *Wisdom v. Memphis*, 2 Flip. 285; *Stewart v. Justices of St. Clair Co. Court*, 47 Fed. R. 482, 484, quoted *supra*, § 361, note 8.

<sup>11</sup> *Riggs v. Johnson County*, 6 Wall. 166; *Weber v. Lee County*, 6 Wall. 210; *Lansing v. County Treasurer*, 1 Dill. 522; *Laird v. Mayor of De Soto*, 25 Fed. R. 76.

<sup>12</sup> *Moran v. Elizabeth*, 9 Fed. R. 72.

<sup>13</sup> *U. S. v. Elizabeth*, 9 Rep. 232; *U. S. v. Auditors of Brooklyn*, 8 Fed. R. 473; *U. S. v. New Orleans*, 17 Fed. R. 483. The filing of a certificate of the judgment with a city clerk in Montana was held to be a sufficient demand. *Mayor, etc. of Helena v. U. S. ex rel. Helena Waterworks (C. A.)*, 104 Fed. R. 113.

<sup>14</sup> *U. S. v. Oswego*, 28 Fed. R. 55; *Brockway v. Oswego*, 40 Fed. R. 612;

*McAleer v. Clay County*, 42 Fed. R. 665; *Stewart v. Justices of St. Clair Co. Court*, 47 Fed. R. 482. But see *Amy v. Galena*, 7 Fed. R. 163.

<sup>15</sup> *Hart v. New Orleans*, 12 Fed. R. 292; *New Orleans v. Morris*, 8 Woods, 103, 115. "A mandamus to collect a tax for the payment of a judgment is process in execution, and nobody heretofore has ever questioned the power of a court to control its own process." *Memphis v. Brown*, 97 U. S. 300, per Story, J.

<sup>16</sup> *Poultney v. Lafayette*, 12 Pet. 472; *U. S. v. Union P. R. Co.*, 2 Dill. 527. See High on Extr. Rem., Part I, ch. viii.

<sup>17</sup> *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638, 641.

<sup>18</sup> *Fairbanks v. Amoskeag Nat. Bank*, 80 Fed. R. 602.

should be in conformity with the legal obligation of the respondent.<sup>19</sup> "If a *prima facie* case is presented warranting the relief prayed, the alternative writ issues commanding the respondent forthwith to do the act required, or to show cause why it should not be done. After the granting of the writ three courses are open to the respondent: first, he may do the thing required; second, he may in most of the States demur; and third, he may make return."<sup>20</sup> By the common law the return was not traversable.<sup>21</sup> By the statute 9 Anne, ch. 20, a traverse was allowed to the return to a writ of mandamus in proceedings against persons claiming to hold public offices instituted by any person to obtain admission or restoration to office or to the franchises of being burgesses or freemen. A peremptory writ of mandamus will rarely if ever be issued without notice.<sup>22</sup> The writ and other proceedings upon an application for a mandamus to compel the levy of a tax under a judgment against a public corporation should ordinarily be addressed by name to the officers whose duty it is to act, and also describe them in their official capacity.<sup>23</sup> A mandamus is sufficient when merely addressed to a public officer by his official title without naming him,<sup>24</sup> although the corporation has another title under which its charter gives it power to be sued.<sup>25</sup> The writ may also be addressed to the corporation itself, as in the case of a county.<sup>26</sup> When a State statute provides that service of process against a public board may be made upon its clerk, service of the writ upon that clerk will be sufficient to justify punishment of the individual members of the board for contempt if they disobey.<sup>27</sup> Amendments of the proceedings including the return may be allowed,<sup>28</sup> but not such an

<sup>19</sup> *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638, 644.

<sup>20</sup> *High on Extr. Rem.*, § 459.

<sup>21</sup> *Enfield v. Hills*, 2 Lev. 236, 238; *Lunt v. Davison*, 104 Mass. 498; *High on Extr. Rem.*, § 457.

<sup>22</sup> *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. R. 602.

<sup>23</sup> *Thompson v. U. S.*, 103 U. S. 480, 484; *The Mayor v. Lord*, 9 Wall. 409.

<sup>24</sup> *Thompson v. U. S.*, 103 U. S. 480; *The Mayor v. Lord*, 9 Wall. 409. As

to the form of the writ, see *State v. Sullivan*, 50 Fed. R. 593.

<sup>25</sup> *The Mayor v. Lord*, 9 Wall. 409.

<sup>26</sup> *Commissioners v. Sellew*, 99 U. S. 624.

<sup>27</sup> *Commissioners v. Sellew*, 99 U. S. 624. But see *U. S. v. Labette County*, 7 Fed. R. 318.

<sup>28</sup> *Supervisors v. Durant*, 9 Wall. 736; *U. S. v. Union Pac. R. Co.*, 4 Dill. 479; s. c. as *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

amendment as would make an entirely new case.<sup>29</sup> It has been held that an amendment cannot be allowed after the reversal by the Supreme Court of an order granting the writ, when pending the writ of error the judgment has become dormant by the lapse of time under the State statute.<sup>30</sup> The writ of mandamus may direct the performance of a series of acts by different persons.<sup>31</sup> It seems that *certiorari* and mandamus cannot be joined in one writ.<sup>32</sup>

Where the duty sought to be enforced is one neglected by a public corporation or a court,<sup>33</sup> and not the purely personal default of a public officer, the death, resignation, or expiration of the term of office of the officer against whom the proceedings are directed will not abate them, and the writ may be issued or enforced against his successor.<sup>34</sup> When the writ or application is based upon the personal default of a public officer, the proceedings abate upon his death or his retirement from office;<sup>35</sup> and in such a case, if the application is granted, costs will be awarded to the relator, although the public officer acted in good faith under an erroneous view of the law.<sup>36</sup>

It is no defense to an application for a mandamus to compel the levy of a tax that, since the suit in which was entered the judgment sought to be enforced, a State court has enjoined the levy.<sup>37</sup> Evidence that a special tax has been levied to pay the relator's claim, and that all claims except those of the same class have been granted, is irrelevant to an application for a mandamus to compel the issue of bonds to liquidate his judgment.<sup>38</sup>

<sup>29</sup> *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638, 644.

<sup>30</sup> *Brockway v. Oswego*, 40 Fed. R. 612.

<sup>31</sup> *Labette County Com'rs v. U. S.*, 112 U. S. 217; *Hicks v. Cleveland (C. C. A.)*, 106 Fed. R. 459.

<sup>32</sup> *Fairbanks v. Amoskeag Nat. Bank*, 30 Fed. R. 602.

<sup>33</sup> *Commissioners v. Sellew*, 99 U. S. 624; *Thompson v. U. S.*, 103 U. S. 480, 485; *Hollon Parker, Petitioner*, 131 U. S. 221.

<sup>34</sup> *Secretary v. McGarrahan*, 9 Wall. 298; *U. S. v. Boutwell*, 17 Wall. 604;

*Thompson v. U. S.*, 103 U. S. 480, 484, 485. The writ may be addressed to the officers and to their successors in office whom it will bind. *Hicks v. Cleveland (C. C. A.)*, 106 Fed. R. 459.

<sup>35</sup> *Secretary v. McGarrahan*, 9 Wall. 298; *U. S. v. Boutwell*, 17 Wall. 604;

*Thompson v. U. S.*, 103 U. S. 480, 484.

<sup>36</sup> *U. S. v. Schurz*, 102 U. S. 407.

<sup>37</sup> *Riggs v. Johnson County*, 6 Wall. 166.

<sup>38</sup> *U. S. ex rel. Fisher v. Board of Liquidation, etc. of New Orleans*, 60 Fed. R. 387.

Disobedience to the writ is punished by attachment for contempt.<sup>39</sup> Directions in the writ for the performance of acts not authorized by law are void,<sup>40</sup> and disobedience thereto is consequently not punishable.<sup>41</sup> Upon a writ of error to the order granting a mandamus to enforce a judgment, no question adjudicated in that judgment can be questioned,<sup>42</sup> unless "where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded;"<sup>43</sup> but it is competent to show that the judgment is void.<sup>44</sup> An alternative writ of mandamus commanding certain designated officials and "such persons as may be elected to fill vacancies in the board of revision and assessment" to do certain acts was held bad on demurrer, as showing that some against whom it was directed had no notice and were not ascertained.<sup>45</sup> The proceedings should be reviewed by a writ of error, not by appeal.<sup>46</sup>

§ 365. **Writs of certiorari.**—The writ of *certiorari* is a writ issued from a superior to an inferior court, ordering the latter to certify to the former certain proceedings before it.<sup>1</sup> At common law, the writ was issued for two purposes: as an appellate proceeding for the re-examination of some action of an inferior tribunal; and as auxiliary process to enable a court to obtain further information in respect to some matter already before it for adjudication.<sup>2</sup> The writ can be issued from a Federal court other than the Supreme Court only for the latter purpose.<sup>3</sup> The Supreme Court has no original jurisdiction to issue a writ

<sup>39</sup> *Commissioners v. Sellew*, 99 U. S. 624; *U. S. v. Lee County*, 2 Biss. 77.

<sup>40</sup> *U. S. v. Sup'rs of Labette County*, 7 Fed. R. 318; *President v. Mayor, etc. of Elizabeth*, 40 Fed. R. 799; *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638, 644.

<sup>41</sup> *U. S. v. Sup'rs of Labette County*, 7 Fed. R. 318; *President v. Mayor, etc. of Elizabeth*, 40 Fed. R. 799; *People v. Colorado Cent. R. Co.*, 42 Fed. R. 638, 644.

<sup>42</sup> *Harshman v. Knox County*, 122 U. S. 306.

<sup>43</sup> *Brownsville v. Loague*, 129 U. S. 493, 505.

<sup>44</sup> *Moore v. Edgefield*, 32 Fed. R. 498.

<sup>45</sup> *U. S. v. City of Elizabeth*, 42 Fed. R. 45.

<sup>46</sup> *Muhlenberg County v. Dyer* (C. A.), 65 Fed. R. 634.

§ 365. <sup>1</sup> *U. S. v. Young*, 94 U. S. 258, 259. See *Harris v. Barber*, 129 U. S. 366, 369.

<sup>2</sup> *U. S. v. Young*, 94 U. S. 258, 259.

<sup>3</sup> *U. S. R. S.*, § 716; *U. S. v. Young*, 94 U. S. 258, 260; *Ex parte Van Orden*, 3 Blatchf. 166; *In re Martin*, 5 Blatchf. 303; *Fowler v. Lindsey*, 3 Dall. 411.

of *certiorari* to examine the proceedings of a military commission.<sup>4</sup> A Circuit Court of the United States cannot thus bring before it the proceedings before a commissioner which it is not authorized to correct.<sup>5</sup> A Circuit Court cannot by *certiorari* remove a cause from a District Court of the United States before final judgment; but by entering his appearance and pleading in the Circuit Court without objection, a party waives his right to object subsequently to such a proceeding.<sup>6</sup> Any court of the United States may issue a writ of *certiorari* as ancillary to a writ of *habeas corpus*.<sup>7</sup> A Circuit Court has power to issue the writ of *certiorari* to a State Court requiring the latter to make return of the record in a suit which has been removed from the latter to the former.<sup>8</sup> In case of the removal of a civil suit or criminal prosecution against an officer of the United States under section 643 of the Revised Statutes, the clerk of the Circuit Court must issue the writ for the same purpose.<sup>9</sup> If the record sent up on appeal or writ of error is incomplete, it may be corrected by *certiorari*.<sup>10</sup> It has been said that proceedings that have taken place since the appeal or writ of error cannot be thus removed,<sup>11</sup> but the Supreme Court has thus reviewed proceedings to punish a person for contempt in suing out a writ of error and an order forbidding the further prosecution of the writ of error.<sup>12</sup> Perhaps, other contempt proceedings may be thus reviewed.<sup>13</sup> An omission to make a finding cannot be thus corrected.<sup>14</sup> The Supreme Court may by order require the Court

<sup>4</sup> *Ex parte Vallandigham*, 1 Wall. 243; *In re Videl*, 179 U. S. 126. Nor, it seems, when an inferior tribunal has been abolished. *Ibid*.

<sup>5</sup> *Ex parte Van Orden*, 3 Blatchf. 166.

<sup>6</sup> *Patterson v. U. S.*, 2 Wheat. 221.

<sup>7</sup> *Ex parte Burford*, 8 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75; *In re Martin*, 5 Blatchf. 303; *Ex parte Stupp*, 12 Blatchf. 501. See *infra*, § 388.

<sup>8</sup> 18 St. at L. 470; 25 St. at L. 433; *infra*, § 390.

<sup>9</sup> *State v. Sullivan*, 50 Fed. R. 593. It has been held that the writ may be issued in vacation by the deputy clerk in the absence of his principal,

and that its address to the United States marshal directing him to make known to the clerk of the State court the removal of the cause, and that such court is required to send a transcript of its record to the Circuit Court, does not invalidate the writ. *Ibid*.

<sup>10</sup> *U. S. v. Gomez*, 1 Wall. 690; *The Rio Grande*, 19 Wall. 178; *Field v. Milton*, 3 Cranch, 514.

<sup>11</sup> *U. S. v. Young*, 94 U. S. 258; *U. S. v. Adams*, 9 Wall. 661.

<sup>12</sup> *In re Chetwood*, 165 U. S. 443, 453, 462.

<sup>13</sup> *Ibid*.

<sup>14</sup> *U. S. v. Adams*, 9 Wall. 661.



of Claims to find a specific fact.<sup>15</sup> An error in a bill of exceptions cannot be thus corrected;<sup>16</sup> although the judge who settled the same may himself do so.<sup>17</sup>

The Supreme Court may order by *certiorari* or otherwise any case in which the decision of the Circuit Court of Appeals is made final "to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."<sup>18</sup> Such a *certiorari* has been granted after the decision of the Circuit Court of Appeals.<sup>19</sup> In an extraordinary case, it may issue to review the decision of the lower court upon an appeal from an interlocutory order.<sup>20</sup> This was done where one of the judges below was disqualified from sitting in the case.<sup>21</sup> "This branch of our jurisdiction should be exercised sparingly, and with great caution."<sup>22</sup> The inquiry upon such an application is "whether the matter is of sufficient importance in itself and sufficiently open to controversy" to justify the writ.<sup>23</sup>

It may be that the Supreme Court of the District of Columbia has power to review by *certiorari* in a proper case a decision of a *quasi*-judicial nature made by an executive officer of the United States at Washington.<sup>24</sup>

It seems that *certiorari* and *mandamus* cannot be joined in one writ,<sup>25</sup> but the petition may pray for these writs in the alternative.<sup>26</sup> Upon a petition for a writ of *certiorari* or *mandamus*, and a motion thereon argued on a notice, where the right to a writ of *certiorari* was doubtful, the Supreme Court

<sup>15</sup> U. S. v. Adams, 9 Wall. 661.

<sup>16</sup> Stimpson v. Westchester R. Co., 3 How. 553. But see Morgan v. Curtinius, 19 How. 8.

<sup>17</sup> Stimpson v. Westchester R. Co., 3 How. 553; *infra*, § 377.

<sup>18</sup> 26 St. at L., § 6, p. 828. See *infra*, chapter on Writs of Error and Appeals.

<sup>19</sup> Lau Ow Bew, Petitioner, 141 U. S. 583, per Fuller, C. J.

<sup>20</sup> Amer. Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 387, 388. But see In re Tampa Suburban R. Co., 168 U. S. 583.

<sup>21</sup> Amer. Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372.

<sup>22</sup> Lau Ow Bew, Petitioner, 141 U. S. 583, 589, per Fuller, C. J.

<sup>23</sup> Lau Ow Bew, Petitioner, 141 U. S. 583, 587, per Fuller, C. J.

<sup>24</sup> Alexandria C. R. & Br. Co. v. District of Columbia, 5 Mackey (D. C.), 376; Wood v. District of Columbia, 6 Mackey (D. C.), 142; Foster & Abbott on the Federal Income Tax, 238.

<sup>25</sup> Fairbanks v. Amoskeag Nat. Bank, 30 Fed. R. 602.

<sup>26</sup> Amer. Const. Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372.

directed the entry of a rule to show cause why the writ should not issue for a single purpose only.<sup>27</sup> The grant of the writ depends on the discretion of the court.<sup>28</sup> A preliminary inquiry into a jurisdictional fact may be directed by the court before passing on the application for the writ.<sup>29</sup> The return to the writ of *certiorari* should be by the clerk under his hand and the seal of the court.<sup>30</sup> The return need not be signed by the judge.<sup>31</sup> “A writ of *certiorari*, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up, after judgment, the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error. Although the granting of the writ of *certiorari* rests in the discretion of the court, yet after the writ has been granted and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error.”<sup>32</sup>

§ 366. Writs of habeas corpus in general.—The writ of *habeas corpus* is a high prerogative writ known to the common law, directing the production of a prisoner before a court or magistrate, the great object of which is the liberation of those who may be imprisoned without sufficient cause.<sup>1</sup> It is then termed a writ of *habeas corpus ad subjiciendum*.<sup>2</sup> There were also by the common law four other writs of *habeas corpus*: the *habeas corpus ad respondendum*; *ad satisfaciendum*; and *ad faciendum et recipiendum*, which removed a prisoner for debt from an inferior to a superior court for further proceedings in the same or a subsequent action;<sup>3</sup> and the *habeas corpus ad prosequendum, testificandum, deliberandum*, which removed a prisoner for debt or crime in order to prosecute or testify in another court.<sup>4</sup> The *habeas corpus cum causa* is used in the re-

<sup>27</sup> Ibid.<sup>28</sup> *Ex parte Hitz*, 111 U. S. 766.<sup>29</sup> *In re Baiz*, 135 U. S. 408, 431, per Fuller, C. J., citing *Ex parte Hitz*, 111 U. S. 766.<sup>30</sup> *Fennemore v. U. S.*, 3 Dall. 357, 360, all note.<sup>31</sup> *Stewart v. Ingle*, 9 Wheat. 526.<sup>32</sup> *Gray, J.*, in *Harris v. Barber*, 129 U. S. 366, 369; *Amer. Const. Co. v.**Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387.§ 366. <sup>1</sup> *Ex parte Watkins*, 8 Pet. 193, 202.<sup>2</sup> 8 Bl. Com. 181.<sup>3</sup> 8 Bl. Com. 129, 130; *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cranch, 75, 97.<sup>4</sup> 8 Bl. Com. 130; *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cranch,



removal of criminal proceedings from the State courts to the Circuit Courts of the United States.<sup>5</sup>

The Supreme Court, the Circuit Courts, and the District Courts of the United States have power to issue the writ of *habeas corpus*.<sup>6</sup> Except in cases affecting ambassadors, other public ministers, or consuls, the Supreme Court can only issue the writ of *habeas corpus* for a review of the judicial decision of some inferior officer or court.<sup>7</sup> Consequently, the Supreme Court cannot issue the writ to inquire into the legality of an arrest by a municipal police officer under a warrant issued by a State or municipal police judge.<sup>8</sup>

Any justice or judge of any of those courts has power to issue a writ of *habeas corpus* for the purpose of an inquiry into the cause of a restraint of liberty within his jurisdiction.<sup>9</sup> A justice of the Supreme Court may grant the writ and hear argument on the return in any part of the United States.<sup>10</sup> No Federal court or judge has power to discharge by a writ of *habeas corpus* a prisoner in jail, unless such prisoner is in custody under or by color of the authority of the United States; or is committed for trial before some court of the United States; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or a law or treaty of the United States; or, being a revenue officer of the United States, is in custody on account of any act done or omitted under color of his office or under color of any revenue law; or, being a subject or citizen of a foreign State and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order or sanction of any foreign State or under color thereof, the validity and effect of which depend upon the law

75, 97; *In re Leo Hem Bow*, 47 Fed. R. 302; *Ex parte Peck*, 8 Blatchf. 123; *U. S. v. Tilden*, 10 Ben. 566; *supra*, § 286.

<sup>5</sup> U. S. R. S., §§ 642, 643; *Virginia v. Paul*, 148 U. S. 107; *infra*, §§ 388, 389. In certain cases the clerk, and even, it has been held, his deputy, can issue such a writ without an

order of the court. *State v. Sullivan*, 50 Fed. R. 593.

<sup>6</sup> U. S. R. S., § 751.

<sup>7</sup> *Ex parte Hung Hang*, 108 U. S. 552; *Ex parte Barry*, 2 How. 65.

<sup>8</sup> *Ex parte Hung Hang*, 108 U. S. 552.

<sup>9</sup> U. S. R. S., § 752.

<sup>10</sup> *Ex parte Clarke*, 100 U. S. 399, 401.

of nations; or unless the writ is necessary to bring the prisoner into court to testify.<sup>11</sup>

The writ of *habeas corpus ad subjiciendum* cannot be issued in favor of a person unless he is actually restrained of his liberty, or is threatened with such restraint by a person with the present means of enforcing it.<sup>12</sup> Merely moral duress is insufficient.<sup>13</sup> The validity of his conviction of crime cannot be thus tested by a person who has been pardoned and is not restrained of his liberty, although he has refused to accept such pardon.<sup>14</sup>

The writ of *habeas corpus* cannot be used to correct errors and irregularities, however flagrant, committed within the sphere of the authority of the court.<sup>15</sup> But a party imprisoned

<sup>11</sup> U. S. R. S., §§ 753, 641, 643. See also 18 St. at L. 157.

For the history of this legislation, see *In re Burrus*, 136 U. S. 586, 589, per Miller, J.; and a note by Ex-Judge S. D. Thompson, 18 Fed. R. 70. It has been held that upon a petition for the writ of *habeas corpus* to release a United States marshal from custody under State process, the Federal court cannot inquire into the truth or justice of the charges against him, but is limited to the question whether his alleged unlawful acts were done in pursuance of a law of the United States, *In re Marsh*, 51 Fed. R. 277; and that where deputy marshals are imprisoned by State authorities on a charge of murder, based on the killing of a person while resisting arrest on process from a Federal court, the latter court has jurisdiction to issue a writ of *habeas corpus*, and on the return to summarily hear evidence and finally dispose of the charges against such deputies. *Kelly v. Georgia*, 68 Fed. R. 652. It has been held that an act done by an officer of the United States in the discharge of his official duty is done in pursuance of a law of the United States, although there is no express statutory authority for the same. *In re Neagle*, 135 U. S. 1. An officer of the United States may

be released by the writ of *habeas corpus* when he has been indicted, *Ohio v. Thomas*, 173 U. S. 276; *In re Fair*, 100 Fed. R. 149; or convicted in a State court for a violation, in the discharge of his official functions, of a State statute which, so far as it applied to him, the State had no power to enact. *In re Waite*, 81 Fed. R. 859.

<sup>12</sup> *Wales v. Whitney*, 114 U. S. 564, 572.

<sup>13</sup> Thus, when the party seeking the writ was a naval officer in Washington, and the basis of his application was a letter from the Secretary of the Navy inclosing charges against him, together with a notice of the session of a court-martial to consider them, and concluding, "You are hereby placed under arrest, and you will confine yourself to the limits of Washington;" it was held that the petitioner was not under such restraint as to warrant the issue of the writ. *Wales v. Whitney*, 114 U. S. 564. The court, however, refused to inquire whether the prisoner had been surrendered by collusion with his bail. *In re Grice*, 79 Fed. R. 627.

<sup>14</sup> *Re Callicot*, 8 Blatchf. 89.

<sup>15</sup> *Ex parte Terry*, 128 U. S. 289, 304; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Parks*, 93 U. S. 18; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Bige-*

under an order made by a court of the United States, where it does not possess jurisdiction of either the person or the subject-matter, can review that order by such a writ.<sup>16</sup> A prisoner

low, 113 U. S. 328. After judgment of conviction, a prisoner cannot be released by a writ of *habeas corpus* upon the ground that the facts charged in the indictment do not constitute a crime within the meaning of the statute. *Ex parte Parks*, 93 U. S. 18; *Ex parte Watkins*, 3 Pet. 193, 203; *Ex parte Yarbrough*, 110 U. S. 651, 654. But see *In re Mayfield*, 141 U. S. 107, 116. Nor because of a slight lack of certainty in the indictment. *U. S. v. Pridgeon*, 153 U. S. 48. Nor because an improper person sat on the grand jury which indicted him. *Ex parte Harding*, 120 U. S. 782. See *In re Wilson*, 140 U. S. 575. Nor because of an error in sustaining or overruling a challenge to a juror. *In re Schneider*, No. 2, 148 U. S. 162; *Ex parte Murray*, 66 Fed. R. 297. Nor because the court improperly consolidated indictments. *De Bara v. U. S. (C. C. A.)*, 99 Fed. R. 942; *Howard v. U. S. (C. C. A.)*, 75 Fed. R. 986. Nor because the court refused to assign him counsel and forced him to trial without sufficient time to prepare his defense. *In re McKnight*, 52 Fed. R. 799. Nor because he was convicted upon insufficient evidence. *In re Harkell*, 52 Fed. R. 195. Nor for errors committed in the course of his trial,—even, it has been held, if these errors were infractions of the Constitution, such as a refusal to sustain a plea of a former conviction for the same cause, *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Ulrich*, 43 Fed. R. 661; provided the infringement of the Constitution does not clearly appear upon the record. *Nielsen, Petitioner*, 131 U. S. 176. Nor because he was refused compulsory process for the attendance of witnesses on his behalf. *Ex parte Harding*, 120 U. S.

782. See *In re Wilson*, 140 U. S. 575. Nor because he was tried by a *de facto* State judge who had no legal title to the office. *Ex parte Ward*, 173 U. S. 452. Nor because he was convicted upon an information filed by a *de facto* State prosecutor who was not an officer *de jure*. *In re Humason*, 46 Fed. R. 388. Nor because he was denied bail pending a writ of error in a State court. *Ibid*. Nor because his petition for a removal was denied. *Ex parte Murray*, 66 Fed. R. 297. The rule that, unless the contrary appears on the record, a cause is deemed to be without the jurisdiction of a Circuit or District Court of the United States, has no application where the judgment of such a court is attacked collaterally by *habeas corpus*, *Cuddy, Petitioner*, 131 U. S. 280, 285; or otherwise, *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, 185; *McCormick v. Sullivant*, 10 Wheat. 192, 199; *Galpin v. Page*, 18 Wall. 350, 365. A person imprisoned for contempt of an order of a Federal court, where the record shows no Federal jurisdiction, is not entitled to discharge. *In re Eaton*, 51 Fed. R. 804; *In re Lennon*, 166 U. S. 548. *Cf.* *In re Swan*, 150 U. S. 637; *In re Debs*, 158 U. S. 564; *In re Tyler*, 149 U. S. 164.

<sup>16</sup> *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *In re Ayers*, 123 U. S. 443, 485; *In re Sawyer*, 124 U. S. 200, 221; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Wilson*, 114 U. S. 417. It has been said that "if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction or because it is rendered under a law clearly unconstitutional, or because it is senseless, and with-

may be discharged by *habeas corpus* when he is held by any court, State or Federal, under process based upon a city ordi-

out meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on *habeas corpus*. Bradley, J., in U. S. v. Patterson, 29 Fed. R. 775, 778. A prisoner was discharged by a writ of *habeas corpus*, when<sup>e</sup> he had been convicted in a court of the United States of a capital or infamous crime upon an information without an indictment. *Ex parte Wilson*, 114 U. S. 417. A crime is considered infamous when punishable by imprisonment in a State prison or penitentiary with or without hard labor. *Ex parte Wilson*, 114 U. S. 417; *Mackin v. U. S.*, 117 U. S. 348. A prisoner may be discharged by *habeas corpus* when his conviction was in a court of the United States, under an indictment, the body of which was amended by the court. *Ex parte Bain*, 121 U. S. 1. Or under an indictment found by a grand jury unauthorized by law. *Ex parte Farley*, 40 Fed. R. 66. But see *In re Wilson*, 140 U. S. 575; *Ex parte Harding*, 120 U. S. 782. Or under a statute, State or Federal, which is repugnant to the Federal Constitution. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Curtis*, 106 U. S. 371. Or under a judgment imposing a second penalty or different penalty from that previously imposed upon the same party for the same offense, although the former judgment was entered at the same term as the latter. *Ex parte Lange*, 18 Wall. 163; *Nielsen, Petitioner*, 131 U. S. 176. Or under a judgment entered upon a conviction under several indictments, and imposing more than one punishment for a continuous offense. *In re Snow*, 120 U. S. 274. Or under a judgment confining him in a penitentiary for a crime punishable by imprison-

ment in a jail only. *In re Bonner*, 151 U. S. 242. Or even, it has been held, when sentenced to imprisonment without hard labor in a house of correction for a crime punishable by imprisonment with hard labor in the same place of confinement. *In re Christian*, 82 Fed. R. 199. Or for contempt of a court of the United States by disobedience to an order beyond the power of such court. *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 U. S. 713; *Re Ayres*, 123 U. S. 443; *In re Sawyer*, 124 U. S. 200; *Cuddy, Petitioner*, 131 U. S. 280. Or for contempt of a court of the United States for an act not committed in the presence of the court, when the prisoner has been given no hearing. *Ex parte Terry*, 128 U. S. 289. Or for disobedience to an order when the prisoner was not a party to the suit nor named in the order. *In re Reese (C. C. A.)*, 107 Fed. R. 942. Or for contempt of such a court because of his refusal to answer a question that might tend to criminate him. *Ex parte Irvine*, 74 Fed. R. 954. See *In re Counselman v. Hitchcock*, 142 U. S. 547; *Butler v. Fayerweather (C. C. A.)*, 91 Fed. R. 458. Or, before conviction, when held under a warrant issued by a United States judge or commissioner, under a complaint which does not state an offense under a statute of the United States. *Ex parte Bollman and Ex parte Swartwout*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 201; *Ex parte Jenkins*, 2 Wall. C. C. 521, 528; *In re Martin*, 5 Blatchf. 303. See *Ex parte Carll*, 106 U. S. 521. But see *Price v. M'Carty*, 89 Fed. R. 84. Or an offense of which such judge or commissioner has jurisdiction. *In re Ferez*, 7 Blatchf. 34; *In re Cross*, 20 Fed. R. 824; *U. S. v. Rogers*, 23 Fed. R. 658; *In re Kelly*, 25 Fed. R. 268. Even after indictment in another

nance,<sup>17</sup> or a statute,<sup>18</sup> State or Federal, which is repugnant to the Federal Constitution; or when held by a State court under a charge of a crime exclusively within the jurisdiction of the

district to remove the prisoner to which the warrant is issued. *In re Terrell*, 51 Fed. R. 213; *In re Greene*, 52 Fed. R. 104.

The writ will issue in proceedings for extradition to another State or to a foreign country where the prisoner is held under a complaint or an indictment which does not charge an extraditable offense, *In re Ferez*, 7 Blatchf. 84; *In re Kelly*, 25 Fed. R. 268; *Ex parte Lane*, 6 Fed. R. 84; *In re Fitton*, 45 Fed. R. 471; but see *Ex parte Whitten*, 67 Fed. R. 230; or which is founded upon a State statute that is unconstitutional, *In re Murphy*, 87 Fed. R. 549; but see *Pearce v. Texas*, 155 U. S. 311; or because after extradition in the United States from a foreign country the prisoner is held in violation of a treaty under a different charge from that upon which the extradition was based. *Cosgrove v. Winney*, 174 U. S. 64; *U. S. v. Runscher*, 119 U. S. 407. *Cf. In re Rowe* (C. C. A.), 77 Fed. R. 161; *In re Miller*, 23 Fed. R. 82. But in neither case will the court, on *habeas corpus*, review the decision of a disputed question of fact, *Benson v. McMahon*, 127 U. S. 457; *In re Fowler*, 4 Fed. R. 303; *In re Byron*, 18 Fed. R. 722; *In re Roberts*, 24 Fed. R. 132; *In re Morris*, 40 Fed. R. 824; *Orteiza v. Jaco-*

*bus*, 136 U. S. 330; *Ex parte Bryant*, 167 U. S. 104; *Ornelas v. Ruiz*, 161 U. S. 502; *Ex parte Reggel*, 114 U. S. 642; *Sternaman v. Peck* (C. C. A.), 80 Fed. R. 883; nor discharge a prisoner for errors in the admission or exclusion of evidence, *Benson v. McMahon*, 127 U. S. 457, 461; *In re Cortes*, 136 U. S. 330; nor for irregularities or errors not affecting the jurisdiction, *Savin, Petitioner*, 131 U. S. 267, 279; *Stevens v. Fuller*, 136 U. S. 468, 478; *In re Tyler*, 149 U. S. 164; *In re Adutt*, 55 Fed. R. 376; nor because he was illegally brought within the United States and there regularly arrested, *Ex parte Ker*, 18 Fed. R. 167; *Ker v. Illinois*, 119 U. S. 437; *Mahon v. Justices*, 127 U. S. 700; *Cook v. Hart*, 146 U. S. 183; nor, it seems, because the extradition was obtained through the use of false affidavits, *In re Moore*, 75 Fed. R. 821. *Contra, Tennessee v. Jackson*, 36 Fed. R. 258.

"A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject-matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent

<sup>17</sup> *Stockton Laundry Case*, 26 Fed. R. 611. "Though the law itself be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Consti-

tution." *Yick Wo v. Hopkins*, 118 U. S. 356, 368. For a case where an application for the writ to review a commitment by a State senate for contempt was denied, see *In re Lawrence*, 80 Fed. R. 99.

<sup>18</sup> *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Curtis*, 106 U. S. 371; *Medley, Petitioner*, 134 U. S. 160.

Federal courts;<sup>19</sup> or it seems, if in custody under sentence by a State or Federal court without a trial upon a plea of not guilty;<sup>20</sup> or it seems if, when indicted for one crime, he had pleaded guilty of another, and were held in custody under sentence for either.<sup>21</sup> A prisoner who is held in custody under a conviction of a Federal court may, after his pardon by the President of the United States, be released by *habeas corpus*.<sup>22</sup> In one case a Federal court granted a writ of *habeas corpus* because a State judge had exercised powers not given him by the State statute.<sup>23</sup> It has been doubted whether a Circuit Court

legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition such decision of the commissioner cannot be reviewed by a Circuit Court or by this court, on *habeas corpus*, either originally or upon appeal. In *re Cortes*, 136 U. S. 330, 334; *Ex parte Rickelt*, 61 Fed. R. 203. A deserter cannot, after conviction by a court-martial, be discharged by *habeas corpus* on the ground that at the time when he voluntarily enlisted he was above the legal age, In *re Grimley*, 187 U. S. 147; nor on the ground that he enlisted when a minor without the consent of his parent or guardian, at least unless the parent or guardian applies for the relief, In *re Morrissey*, 137 U. S. 157. But a minor who had not deserted, but who was under charges of fraud which had not been acted upon, was discharged by the writ, upon his father's petition, because the enlistment was unlawful under U. S. R. S., § 1117. In *re Carver*, 103 Fed. R. 624. *Cf.* In *re Roberts*, 99 Fed. R. 948; *Carter v. M'Caughry*, 105 Fed. R. 614; *Wolfe Tone's Case*, Green Bag, vol. V, p. 662.

By the act of August 18, 1894, 128 St. at L. 390: "In every case where an alien is excluded from admission into the United States under any

law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officer, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

It has been held that this deprives the courts of the power to determine by the writ of *habeas corpus* whether the immigrant belonged to one of the excluded classes. *U. S. v. Wong Chow* (C. C. A.), 108 Fed. R. 376. *Cf.* *Li Sing v. U. S.*, 180 U. S. 486; *Lem Moon Sing v. U. S.*, 158 U. S. 538; In *re Way Tai*, 96 Fed. R. 484; In *re Ota*, 96 Fed. R. 487. For the former rule see *Ekiu v. U. S.*, 142 U. S. 651; *Fong Yue Ting v. U. S.*, 149 U. S. 698. Should the excluded party claim to be a citizen of the United States, a different question would arise. In *re Jew Wong Loy*, 91 Fed. R. 240; *Gee Fook Sing v. U. S.* (C. C. A.), 49 Fed. R. 146; *Lem Hing Dun v. U. S.*, 49 Fed. R. 148.

<sup>19</sup> In *re Loney*, 134 U. S. 372; In *re Neagle*, 135 U. S. 1. *Cf.* *Ex parte Thompson*, 1 Flippin, 507; *U. S. v. McClay*, 4 Cent. L. J. 255.

<sup>20</sup> In *re Converse*, 42 Fed. R. 217, 219.

<sup>21</sup> In *re Converse*, 42 Fed. R. 217, 219. But see In *re Maldonado*, 63 Fed. R. 825.

<sup>22</sup> *Greathouse's Case*, 2 Abb. U. S. 382.

<sup>23</sup> In *re Monroe*, 46 Fed. R. 52. *Cf.* In



has any authority to release by *habeas corpus* a prisoner held under the judgment of another Circuit Court of the United States.<sup>24</sup> It has been held that the Circuit Courts of the United States may take jurisdiction by *habeas corpus* when there is no controversy arising under the Constitution or laws of the United States, but there is a difference of citizenship between the parties; that they can then inquire into the legality of the imprisonment, but cannot exercise any discretion in the capacity of *parens patriæ* as to the place or character of the confinement.<sup>25</sup> The District Courts of the United States have no such jurisdiction.<sup>26</sup> An Indian may obtain the writ in a proper case.<sup>27</sup> A proceeding upon an application for the writ of *habeas corpus* cannot be removed from a State to a Federal court.<sup>28</sup> A State court has not the power to grant a writ of *habeas corpus* to a person held under color of authority from the United States.<sup>29</sup> When such a writ is issued by a State court, the person to whom it is directed should make a return stating that he holds the prisoner under the authority of the United States, but otherwise disregard the writ.<sup>30</sup> A State court may by a writ of *habeas corpus* examine the legality of the detention of a prisoner by a person appointed by the governor of a State in extradition proceedings.<sup>31</sup>

The existence and extent of the original jurisdiction of the Circuit Courts of Appeals to issue the writ of *habeas corpus* is unsettled. It has been held that a Circuit Court of Appeals has no jurisdiction to issue a writ of *habeas corpus* for service outside of the circuit in which it sits, although its jurisdiction

re King, 46 Fed. R. 905, 906-911; In re Davenport, 102 Fed. R. 540. But see In re Duncan, 139 U. S. 449; Leeper v. Texas, 139 U. S. 462.

<sup>24</sup> In re Eaton, 51 Fed. R. 804, 806.

<sup>25</sup> King v. McLean Asylum of Mass. Gen. Hospital (C. C. A.), 64 Fed. R. 381. It has been held that the right to the custody of a child may be thus determined when the necessary difference of citizenship exists. Bennett v. Bennett, Deady, 299; U. S. v. Savage, 91 Fed. R. 490. See also U. S. v. Green, 3 Mason, 482; U. S. ex rel. Wheeler v. Williamson, 4 Am.

L. Reg. 5; In re Burrus, 136 U. S. 586, 593, 597. *Contra*, Ex parte Evert, 1 Bond, 197; In re Barry, 42 Fed. R. 113; s. c., 136 U. S. 507, note; cited in argument of counsel in Barry v. Mercein, 5 How. 103, 104.

<sup>26</sup> In re Burrus, 136 U. S. 586.

<sup>27</sup> U. S. v. Cook, 5 Dillon, 453.

<sup>28</sup> Kurtz v. Moffitt, 115 U. S. 487.

<sup>29</sup> Ableman v. Booth, 21 How. 506; Tarble's Case, 18 Wall. 397.

<sup>30</sup> Ableman v. Booth, 21 How. 506.

<sup>31</sup> Robb v. Connolly, 111 U. S. 624; Roberts v. Reilly, 116 U. S. 80, 94.

is invoked to thus review the decision of the District Court of a Territory within its circuit.<sup>32</sup>

§ 366a. **Suspension of writ of habeas corpus.**—The Constitution provides that “the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”<sup>1</sup> During the civil war the question as to the department of the government in which the right of suspension rests was much debated, but never authoritatively decided. President Lincoln claimed that he had the authority to suspend the writ, and many arrests were made in accordance with this ruling.<sup>2</sup> Subsequently Congress by statute suspended the writ, and sought to validate the arrests previously made.<sup>3</sup> Mr. Justice Miller inclined to the view that so much of the statute as validated an arrest previously made was constitutional, and deprived the party arrested of the right to damages for false imprisonment.<sup>4</sup> A number of pamphleteers, amongst them Horace Binney, defended the position of the President. Other pamphleteers, amongst them Ex-Justice B. R. Curtis, claimed that the writ could only be suspended by Congress. Chief Justice Taney held this, in an opinion upon an application for the writ of *habeas corpus*; but his decision was not obeyed.<sup>5</sup> Judge Hall held that the right to suspend the writ was vested in the courts, and that a necessity for the suspension had arisen when the arrest reviewed by him was made.<sup>6</sup> Judge Smalley held that

<sup>32</sup> In re Boles, 48 Fed. R. 75.

§ 366a. <sup>1</sup> Const., art. 1, § 9.

<sup>2</sup> See, for a highly colored enumeration of such arrests, The American Bastille, by John A. Marshall, Phila. In 1871 Governor Holden of North Carolina was removed by impeachment for doing this. Foster's Commentaries on the Constitution, vol. I, p. 676.

<sup>3</sup> 12 St. at L. 755; 14 St. at L. 482. See the proclamation of President Lincoln, 14 St. at L. 734. A bill to suspend the writ of *habeas corpus* passed the Senate January 23, 1807, and was defeated in the House by John Randolph of Roanoke on Janu-

ary 26, 1807. 8 Benton's Abr. 414. See also In re Boyle (Idaho, 1899), 57 Pac. R. 706; and Foster's Commentaries on the Constitution, vol. II.

<sup>4</sup> In re Murphy, 1 Woolw. 141. To the same effect is McCall v. McDowell, 1 Abb. U. S. 212.

<sup>5</sup> Ex parte Merryman, Taney, 246. Contra, Ex parte Field, 5 Blatchf. 63; Ex parte Vallandigham, U. S. D. C., D. Ohio, per Leavitt, J.

<sup>6</sup> Judge Hall, in the Matter of the Petition of Oliver P. Thomas, in behalf of Joel McKee, U. S. D. C., Judicial District of Colorado, Oct. 14, 1861.



the War Department had no power to suspend the writ.<sup>7</sup> "The suspension of the privilege of the writ does not bar the writ. The writ issues as a matter of course, and on the return made the court decides whether the party applying is denied the right of proceeding any further with it."<sup>8</sup>

§ 367. **Practice on application for habeas corpus.**—The application for a writ of *habeas corpus* should be made by a written complaint addressed to the court or judge from whom the writ is sought, and sworn to by the complainant, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known.<sup>1</sup> It seems that it is not necessary that the application be made by the prisoner or by some one whom he has authorized to represent him, but that the writ may be granted at the request of a stranger who has no legal interest in the matter;<sup>2</sup> but it is the safer practice for the complaint in

<sup>7</sup> *Ex parte Field*, 5 Blatchf. 63.

<sup>8</sup> *Ex parte Milligan*, 4 Wall. 2, 181.

On the subject treated in this section, see *Ex parte Merryman*, Taney, 246; *In re Benedict*, Hall, J., 4 West. L. Month. 449; *McCall v. McDowell*, 1 Abb. U. S. 212; *Ex parte McQuillon*, 3 West. L. Month. 440; s. c., 9 Pitts. L. J. 29; *Griffin v. Wilcox*, 21 Ind. 370; *Kemp v. State*, 16 Wis. 359; *In re Dunn*, 25 How. Pr. (N. Y.) 467; *Ex parte Field*, 5 Blatchf. 63; *Ex parte Vollandigham*, U. S. D. C., D. Ohio, by Leavitt, J.; *In re Fagan*, 2 Spr. 91; *Commonwealth v. Frink*, 4 Am. Law Reg. (N. S.) 700, Philadelphia, 1892; opinion of Attorney-General Cushing on Martial Law, 8 Op. A. G. 365; opinion of Attorney-General Speed on the Suspension of the Writ of Habeas Corpus; *Whiting's War Powers*, and a number of pamphlets by Horace Binney, Joel Parker, B. R. Curtis and others during the civil war; a list of which is in the second edition of this book.

§ 367. <sup>1</sup> U. S. R. S., § 754. It was held that a deputy United States marshal, with a warrant for the ex-

tradition of a person arrested under State civil process, had the right to apply for the writ. *In re Mineau*, 45 Fed. R. 188. A father may thus apply when his child is illegally restrained. *U. S. v. Anderson*, Cooke (Tenn.), 143; *U. S. v. Green*, 3 Mason, 482; *Bennett v. Bennett*, Deady, 299; *supra*, § 366, note 25. See as to the former right of a master to thus obtain a slave, *U. S. ex rel. Wheeler v. Williamson*, 4 Am. Law Reg. 5. A party who had a suit pending in a court was allowed the writ where a judge of that court was arrested. *Ex parte Des Rochers*, 1 McAll. 68.

<sup>2</sup> *Ex parte Des Rochers*, 1 McAll. 68; *In re Hoyle*, 12 Chic. L. N. 279; s. c., 9 Am. L. Rec. 65; *Re Ferrens*, 3 Ben. 445; *The Hottentot Venus*, 13 East, 194; *Wheeler v. Williamson*, 14 Am. Law Reg. 5; *People v. Mercein*, 3 Hill, 399, 407. But see *Re Poole*, 2 McA. (D. C.) 583; *Ex parte Dorr*, 3 How. 103; *Mahon v. Justice*, 127 U. S. 700. The petition was by the Governor of West Virginia. There seems to have been no objection taken to this; but immediately thereafter another petition was presented by a citizen of

such a case to show some good reason for not obtaining the consent of the party detained. An early case holds that when the prisoner has been committed to jail by a public officer, the complaint should be accompanied by a copy of the commitment, or an affidavit that the jailer has refused a copy.<sup>3</sup> The petition must show the jurisdiction of the court or judge to grant the writ.<sup>4</sup> The petitioner may state facts outside of and not inconsistent with the record, showing that the court under the process of which the prisoner is held has no jurisdiction over his person, or in respect to the subject with which he is charged.<sup>5</sup>

When the proceedings of an inferior tribunal are reviewed by a writ of *habeas corpus*, a writ of *certiorari* issues with it

West Virginia, and subsequently the name of the party restrained was substituted for that of the petitioner, and the proceedings on the petition were conducted in his name. At what particular stage of the proceedings the substitution of the name was made does not appear; but there seems to have been no objection taken to the petition being signed by the citizen or by the Governor. See *Virginia v. Paul*, 148 U. S. 107; *infra*, § 388.

It was held where the proceedings had been instituted on behalf of an alleged lunatic by his next friend, that the court might supersede his next friend by the appointment of a guardian *ad litem*, who should investigate the facts and might recommend that the proceeding be abandoned. Pending such an investigation, the proceeding was stayed. *King v. McLean Asylum of Mass. Gen. Hospital* (C. C. A.), 64 Fed. R. 331, 353. An appeal in that case was entertained although taken by the next friend who had been removed. *Ibid.* (C. C. A.), 64 Fed. R. 325. See learned articles on the subject by Theodore Connolly, Esq., in N. Y. L. J. June 5, 1890; Hon. S. D. Thompson, in 18 Fed. R. 68; and *The Jurisdiction of the Federal Courts in Ha-*

*beas Corpus Cases*, 12 Crim. Law Mag. 193.

<sup>3</sup> *Harrison's Case*, 1 Cranch, C. C. 159; *U. S. v. Bollman*, 1 Cranch, C. C. 373.

<sup>4</sup> *Ex parte Milburn*, 9 Pet. 704, note. A general averment that the petitioner is detained in violation of the Constitution and laws of the United States, and that the court below had "no jurisdiction or authority to try and sentence him in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment." *Re Cuddy*, 131 U. S. 280, 286, per Mr. Justice Harlan. See *Whitten v. Tomlinson*, 160 U. S. 231; *King v. McLean Asylum of Mass. Gen. Hospital* (C. C. A.), 64 Fed. R. 331; *Howard v. U. S.*, 75 Fed. R. 986. The proceedings under which the petitioner is imprisoned must be set forth with sufficient detail that their invalidity may appear. *Andersen v. Treat*, 172 U. S. 24; *Craemer v. Washington*, 168 U. S. 124. For the necessary averments in a petition after an order for extradition, see *In re Count de Toulouse Lautrec*, 102 Fed. R. 878.

<sup>5</sup> *In re Mayfield*, 141 U. S. 107, 116; *Re Cuddy*, 131 U. S. 280.

and should be asked in the complaint.<sup>6</sup> The court or judge to whom such an application is made, if his jurisdiction appears, should forthwith grant a writ of *habeas corpus*, unless it appears from the petition that the party is not entitled thereto.<sup>7</sup> The writ is a writ of right;<sup>8</sup> but it does not issue as of course. Some ground for it must be shown.<sup>9</sup> A decision under one writ refusing to discharge the prisoner has been held to be no bar to the issue of any number of subsequent writs.<sup>10</sup> Instead of issuing the writ in the first instance the court may enter a rule to show cause why it should not issue.<sup>11</sup> The Supreme Court will ordinarily refuse to issue the writ in a case of which a Circuit Court of the United States has jurisdiction, unless it is intended to review a decision of such Circuit Court.<sup>12</sup> The

<sup>6</sup> *Ex parte Burford*, 8 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Martin*, 5 Blatchf. 303; *In re Stupp*, 12 Blatchf. 501. See *supra*, § 365.

<sup>7</sup> U. S. R. S., § 755; *In re Haskell*, 52 Fed. R. 795.

<sup>8</sup> *In re King*, 51 Fed. R. 434, 435.

<sup>9</sup> *In re King*, 51 Fed. R. 434, 435; *In re Durrant*, 169 U. S. 39.

<sup>10</sup> *Ex parte Kaine*, 3 Blatchf. 1. But see s. c., 14 How. 103; *Ex parte Robinson*, 6 McLean, 355; *Ex parte Cuddy*, 40 Fed. R. 62; *Ex parte Jugiro*, 44 Fed. R. 754; *Carter v. McClaughry*, 105 Fed. R. 614; *King v. McLean Asylum of Mass. Gen. Hospital (C. C. A.)*, 64 Fed. R. 331, 350. But see *In re Simmons*, 45 Fed. R. 241, where the petition showed a previous denial of the writ. For a criticism of the practice of counsel in applying for successive writs, see *People v. Jugigo*, 128 N. Y. 589. For a defense see 44 Alb. L. J. 21. In *Jugigo's* case, after two applications for the writ had been denied and taken to the Supreme Court by appeal and there affirmed (*Jugiro v. Brush*, 140 U. S. 291; s. c., 140 U. S. 686), a third application was prevented by the absence from New York City of all the Federal judges during the week preceding the executions.

In *Wood's* case, after two similar

applications and appeals (*Wood v. Brush*, 140 U. S. 278; s. c., 140 U. S. 370), there was a similar judicial absence. The counsel for *Wood* found Judge Lacombe at his country residence, and applied for an order denying the application for the writ, and an allowance of an appeal from such order to the Supreme Court of the United States. Judge Lacombe took the papers, and subsequently sent them to the clerk of the Circuit Court for the Southern District of New York, with instructions to erase his signature from the allowance of the appeal and the citation if it appeared that the name of the counsel who made the application was not on the roll of members of the bar of that court. This was done by the clerk against the protest of *Wood's* counsel, who was a member of the bar of the Supreme Court of the United States, and as such claimed the right to practice in all courts of the United States. See *supra*, § 100.

<sup>11</sup> *Ex parte Milburn*, 9 Pet. 704, note; *Trial of Vollandigham*, 45. See *In re Durrant*, 84 Fed. R. 317.

<sup>12</sup> *Ex parte Mirzan*, 119 U. S. 584; *Ex parte Royall*, 117 U. S. 254; *Wales v. Whitney*, 114 U. S. 564; *In re Kemmler*, 136 U. S. 436; *In re Huntington*, 137 U. S. 63.

Supreme Court<sup>13</sup> and the inferior courts of the United States will ordinarily refuse to discharge by *habeas corpus* a prisoner held under indictment by a State court before trial of the indictment,<sup>14</sup> and even after his conviction, if he has still a remedy by writ of error or appeal,<sup>15</sup> in the courts of such State, except when the prisoner is an officer or employee of the United States,<sup>16</sup> or perhaps in the case of an alien who claims under a treaty.<sup>17</sup> In a case where, upon a similar question, the State courts had decided erroneously, the court granted the writ and discharged the prisoner before trial.<sup>18</sup> Where a district judge had upon the trial decided adversely to the claim of the petitioner, the circuit judge refused to review the question collaterally by *habeas corpus*.<sup>19</sup> The Supreme Court will ordinarily refuse to entertain a petition for a *habeas corpus* by a prisoner held under an indictment found in a court of the United States or of the District of Columbia, when no motion to quash or proceeding to test the sufficiency of the indictment has been taken in the Circuit Court;<sup>20</sup> or after conviction when there is a remedy by writ of error or appeal.<sup>21</sup> The writ will be denied by the Supreme Court when it is impossible to dispose of it

<sup>13</sup> *Ex parte Royall*, 117 U. S. 254; *Ex parte Clark*, 128 U. S. 395; *Ex parte Fonda*, 117 U. S. 516.

<sup>14</sup> *Ex parte Royall*, 117 U. S. 241, 254; *Cook v. Hart*, 146 U. S. 183; *New York v. Eno*, 155 U. S. 89; *Pepke v. Corilari*, 155 U. S. 100; *Baker v. Grice*, 169 U. S. 284; *Whitten v. Tomlinson*, 160 U. S. 231.

<sup>15</sup> *Ex parte Frederick*, 149 U. S. 70; *Bergemann v. Backer*, 157 U. S. 655.

<sup>16</sup> *Ohio v. Thomas*, 173 U. S. 276, 285; *Boske v. Comnigore*, 177 U. S. 459.

<sup>17</sup> *Cohn v. Jones*, 100 Fed. R. 639; *Ex parte Royall*, 117 U. S. 241, 254.

<sup>18</sup> *In re Reinitz*, 39 Fed. R. 204. But see as to Supreme Court of District of Columbia, *In re Chapman*, 156 U. S. 211.

<sup>19</sup> *In re Simmons*, 45 Fed. R. 241. But see *In re Johnson*, 46 Fed. R. 477. In a case where, upon demurrer to an indictment, the Circuit Court was

equally divided, and certified the question to the Supreme Court, which remanded the case without any decision as to the sufficiency of the indictment, a district judge subsequently discharged the assured upon *habeas corpus* when held under a second and different indictment for the same acts. *In re Benson*, 58 Fed. R. 962, 972.

<sup>20</sup> *Allen v. Black*, 43 Fed. R. 228. "If the questions are of such a character that it is thought desirable that the opinion of an appellate court should be obtained, such a proceeding as this is the more appropriate way in which to raise them, for a decision adverse to the government is reviewable by appeal, but a similar decision on the trial is final, as the government cannot appeal from a criminal judgment." *Lacombe, J., in In re Terrell*, 51 Fed. R. 213, 214.

<sup>21</sup> *Anderson v. Treat*, 172 U. S. 24

before the term of imprisonment expires.<sup>22</sup> When the application is made to a judge, he may decline to grant it if there is a doubtful question of law involved, since there is no appeal from his decision.<sup>23</sup>

The writ when issued from the court, like other writs issued out of the Federal courts, must bear the seal of the court, be signed by the clerk, and bear teste of the presiding justice of the Supreme Court when issued therefrom or from a Circuit Court, and when issued from a District Court, of the judge thereof, or when that office is vacant, the clerk thereof.<sup>24</sup> The writ must be directed to the person in whose custody the prisoner is detained.<sup>25</sup> When the writ is issued in the case of an alien prisoner domiciled in a foreign State to which he owes allegiance, who is in custody by or under the law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect of which depend on the law of nations; notice of the said proceeding, to be prescribed by the court or judge issuing the writ, must be served on the Attorney-General or other officer prosecuting the pleas of said State; and due proof of such service must be made to the court or judge before the hearing.<sup>26</sup> Otherwise, such notice is not necessary, although the prisoner is confined under the judgment or order of a State court or magistrate;<sup>27</sup> but the courts frequently require it.<sup>28</sup>

The person to whom the writ is directed must make a due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond the distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.<sup>29</sup> The return must be in writing,

<sup>22</sup> *In re Baez*, 177 U. S. 378.

<sup>23</sup> U. S. R. S., §§ 911, 912; *Matter of Kaine*, 14 How. 103, 119. The prisoner will not be discharged if his present confinement is illegal, although he has also been sentenced to a further illegal term, which has not yet begun. *In re Swan*, 150 U. S.

<sup>24</sup> U. S. R. S., § 755.

<sup>25</sup> U. S. R. S., § 762.

<sup>26</sup> *Matter of Leary*, 10 Ben. 197. But see *U. S. v. Jailer of Fayette County*, 2 Abb. U. S. 265.

<sup>27</sup> *U. S. v. Jailer of Fayette County*, 2 Abb. U. S. 265.

<sup>28</sup> U. S. R. S., § 756.

signed by the person to whom the writ is directed,<sup>29</sup> and certifying the true cause of the prisoner's detention.<sup>30</sup> The person making the return must at the same time bring the body of the prisoner before the judge who granted the writ.<sup>31</sup> A failure to do this or to make a return may be punished by attachment.<sup>32</sup> A false return may be similarly punished.<sup>33</sup> If the prisoner is no longer under the control of the person to whom the writ is addressed, the latter must declare, so far as he knows, what has become of him.<sup>34</sup>

Pending the hearing upon the return to a writ of *habeas corpus* the prisoner is in the custody of the court or judge that issued the writ, and may be admitted to bail or remanded to the jail from which he came, or placed in the custody of the marshal.<sup>35</sup> He cannot, while in such custody, be arrested on a second warrant.<sup>36</sup> When the writ is returned, a day must be set for the hearing of the cause not exceeding five days after the return, unless the party petitioning requests a longer time.<sup>37</sup> When the writ is granted by a justice of the Supreme Court in a case of which that court has jurisdiction, and the proceeding is in its nature appellate, that is, to review the proceedings of an inferior court, the justice may postpone the hearing until a session of the whole court.<sup>38</sup> The applicant for the writ or the party imprisoned or restrained may deny under oath any of the facts set forth in the return, or may allege any other material facts.<sup>39</sup> Only distinct and unambiguous statements of fact not denied by the return nor controverted by other evidence will be presumed to be admitted.<sup>40</sup> The court or judge may

<sup>29</sup> *Seavey v. Seymour*, 8 Cliff. 439.

<sup>30</sup> U. S. R. S., § 757. The return is not defective if a material fact not stated therein appears in the petition. *In re Ah Toy*, 45 Fed. R. 795.

<sup>31</sup> U. S. R. S., § 758.

<sup>32</sup> *U. S. v. Bollman*, 1 Cranch, C. C. 373; *U. S. v. Green*, 3 Mason, 482.

<sup>33</sup> *U. S. v. Davis*, 5 Cranch, C. C. 622; *U. S. v. Williamson*, 3 Am. L. Reg. 729; s. c., 4 Am. L. Reg. 5.

<sup>34</sup> *U. S. v. Williamson*, 4 Am. L. Reg. 5. It was held that a State judge acted within his jurisdiction in punishing a parent for disobedience to the writ when the child whose pro-

duction was ordered had been removed from the State. *Ex parte Young*, 50 Fed. R. 526.

<sup>35</sup> *Matter of Kaine*, 14 How. 103. See 27 St. at L., ch. 60, p. 25; *In re Farez*, 7 Blatchf. 845.

<sup>36</sup> U. S. R. S., § 759.

<sup>37</sup> *Ex parte Clarke*, 100 U. S. 899, 403. But see *Matter of Kaine*, 14 How. 103.

<sup>38</sup> U. S. R. S., § 760.

<sup>39</sup> *Whitten v. Tomlinson*, 160 U. S. 231, 242; *Kohl v. Lehbock*, 160 U. S. 293.

<sup>40</sup> U. S. R. S., § 760.



allow the return, and all suggestions against it, to be amended before or after the same are filed.<sup>41</sup> The return is deemed to import verity unless impeached.<sup>42</sup> The court or judge, upon the day set for the hearing, must proceed in a summary way to determine the facts, by hearing the testimony and arguments, and thereupon make an order discharging the prisoner, or remanding him to the custody from which he was removed by the writ.<sup>43</sup>

The present rule seems to be that the petitioner will ordinarily not be discharged if at the time of the return his imprisonment is lawful, although the application was made at a time when he was unlawfully restrained.<sup>44</sup> The order for a discharge may provide that ten days' notice thereof be given to the prosecuting officer,<sup>45</sup> or that the discharge may be delayed a reasonable time sufficient to afford an opportunity for the correction of a judgment under which the prisoner is held,<sup>46</sup> or that the decision is without prejudice to the right of the government to take any lawful measures to have a new and valid sentence imposed by the trial court;<sup>47</sup> or when the court finds that the imprisonment is illegal, it seems that it may in a proper case, instead of ordering a discharge, direct that the prisoner be delivered to the marshal of the district<sup>48</sup> or to a representative of a foreign nation.<sup>49</sup> The order of discharge is *res adjudicata* as to all questions therein determined.<sup>50</sup> And when an officer of the United States is discharged after an indictment by a State court, it seems that no further prosecution for the same cause can be maintained against him in the courts of such State.<sup>51</sup>

<sup>41</sup> *Crowley v. Christensen*, 137 U. S. 86, 94.

<sup>42</sup> U. S. R. S., § 761. See U. S. v. Fowkes (C. C. A.), 53 Fed. R. 13; s. c., 49 Fed. R. 50; *In re Gut Lun*, 83 Fed. R. 141; *Ex parte Lennon*, 166 U. S. 548.

<sup>44</sup> *Iasigi v. Van de Carr*, 166 U. S. 391. *Cf.* *Ekiu v. U. S.*, 142 U. S. 651. *Contra*, *In re Doo Woon*, 18 Fed. R. 898. The petitioner was discharged when his imprisonment was lawful when the writ was allowed, but illegal at the time of its return. *U. S. v. Patterson*, 29 Fed. R. 775.

<sup>45</sup> *Re Medley*, 134 U. S. 160, 175; *Re Savage*, 134 U. S. 176, 177.

<sup>46</sup> *In re Bonner*, 151 U. S. 242, 259-262.

<sup>47</sup> *In re Bonner*, 151 U. S. 242.

<sup>48</sup> *In re Gut Lun*, 84 Fed. R. 323; *In re Mineau*, 45 Fed. R. 188.

<sup>49</sup> *Motherwell v. U. S. ex rel. Alexandroff* (C. C. A.), 107 Fed. R. 437, 440. But see *In re Fitton*, 45 Fed. R. 471.

<sup>50</sup> *U. S. v. Chung Lee*, 71 Fed. R. 277; s. c. in C. C. A., 76 Fed. R. 951; *In re White*, 45 Fed. R. 237.

<sup>51</sup> *In re Neagle*, 135 U. S. 1; *Kelly v. Georgia*, 68 Fed. R. 652.

§ 368. Appeals in habeas corpus proceedings.— Before the Evarts Act of March 3, 1891, an appeal might be taken to the Supreme Court from the final decision of a Circuit Court of the United States, upon an application for a writ of *habeas corpus*, or upon such writ when issued, in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States; and in the case of a prisoner who, being a subject or citizen of a foreign State and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.<sup>1</sup> No appeal lies from a decision of a judge of a Circuit Court of the United States, either to the Supreme Court,<sup>2</sup> or to a Circuit

§ 368. <sup>1</sup> U. S. R. S., § 764, as amended by 23 St. at L., ch. 353, p. 487.

<sup>2</sup> *Carper v. Fitzgerald*, 121 U. S. 87. In that case the petition was presented to the Circuit Judge at his Chambers in Baltimore. He directed the clerk of the Circuit Court for the Eastern District of Virginia, within which the petitioner was imprisoned, to issue a writ returnable before him at the United States Court House in Baltimore. The writ was accordingly issued, under the seal of the court in the usual form of Circuit Court writs, returnable "before the Honorable Hugh L. Bond, Judge of our Circuit Court of the United States for the Eastern District of Virginia, sitting at the United States Court House in Baltimore, Maryland." Upon a demurrer to the return of the writ, an order of discharge was entered. At the foot of this order was the following: "And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia,

and that this order be recorded in said court. Hugh L. Bond, Circuit Judge." The order was held to be not a court order, but a judge's order, and consequently not appealable to the Supreme Court, although it had been docketed there as an appeal from the Circuit Court.

In *Re Palliser*, 136 U. S. 257, the following order was held by the Supreme Court to be a court order and not a judge's order, and consequently appealable, although the Circuit Court which rendered it was of a contrary opinion:

"In the matter of the petition of Charles Palliser for the writ of *habeas corpus*. Upon reading and filing the petition of Charles Palliser, sworn to November 26, 1880, and the writs of *habeas corpus* and *certiorari* thereupon issued, directed to Hon. Martin T. McMahon, marshal for the United States for the Southern District of New York, and the Hon. John A. Shields, United States Commissioner, and returns to said writs made



Court of Appeals.<sup>3</sup> From the final decision of a justice or judge of the United States inferior to the Circuit Court, upon an application for a writ of *habeas corpus*, or upon such writ when issued, an appeal, before the Evarts Act of March 3, 1891, might be taken to the Circuit Court for the district in which the cause was heard, under the same circumstances as would authorize an appeal from a Circuit Court to the Supreme Court.<sup>4</sup> How much of this appellate jurisdiction was repealed by the Evarts Act is not entirely settled. The rule seems to be: that the Supreme Court may review an order of a Circuit or District Court upon an application for the writ of *habeas corpus* when a constitutional or a jurisdictional question or a question involving the construction of a treaty is involved.<sup>5</sup> In the case of a jurisdictional question which does not involve the construction of the Constitution of the United States, that question alone is certified to the Supreme Court by the court below.<sup>6</sup> In other cases of *habeas corpus* the Circuit Courts of Appeals may review the decisions of the Circuit and District Courts,<sup>7</sup> and perhaps of the district judges at chambers.<sup>8</sup>

by said marshal and said commissioner; now after hearing Roger Foster, Esq., of counsel for Charles Palliser, in support of an application for the discharge of said Palliser from custody, said Palliser having been produced before this court by said marshal in obedience to said writ of *habeas corpus*; and after hearing Daniel O'Connell, Esq., Assistant United States Attorney, in opposition to said application, and in support of an application to remand said Palliser to custody, and due deliberation having been had, it is

"Ordered that said writ be dismissed, and that said Palliser be, and he hereby is, remanded to the custody of the said Martin T. McMahon, marshal of the United States for the Southern District of New York.

"E. HENRY LACOMBE."

See also *Carico v. Wilmore*, 51 Fed. R. 200; *In re King*, 51 Fed. R. 434, 440.

The order is appealable when the writ was granted at chambers, but the

order discharging the prisoner was entered at a stated term of the Circuit Court. *Harkrader v. Wadley*, 172 U. S. 148. The hearing of the argument in chambers is immaterial when no objection was made upon that ground below and the order is a court order. *Roberts v. Reilly*, 110 U. S. 80. The Supreme Court cannot review a decision of a Circuit Court upon an application for the writ because of a certificate of a division between two judges. *Ex parte Fom Fong*, 108 U. S. 556; *Ex parte Cota*, 110 U. S. 385.

<sup>3</sup> *Ex parte Jacobi*, 104 Fed. R. 681.

<sup>4</sup> U. S. R. S., § 763.

<sup>5</sup> *Ekiu v. U. S.*, 142 U. S. 651; *Horner v. U. S.*, 146 U. S. 120.

<sup>6</sup> 26 St. at L. 826, § 4.

<sup>7</sup> 26 St. at L. 826, § 5; *Lau Ow Bew v. U. S.*, 144 U. S. 67; *U. S. v. Fowkes*, 53 Fed. R. 13; *King v. McLean Asylum of Mass. Gen. Hospital (C. C. A.)*, 64 Fed. R. 325.

<sup>8</sup> *Webb v. York (C. C. A.)*, 74 Fed. R. 753.

Where there is no question as to the jurisdiction to grant the writ of *habeas corpus*, but the application attacks collaterally another judgment, decree or order of the same or another court, it seems that the appeal lies only to the Circuit Court of Appeals, unless a constitutional or a treaty question is distinctly raised below;<sup>9</sup> or, perhaps, unless in the case of a "prisoner who, being a subject or citizen of a foreign State and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or committed under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity or effect whereof depend upon the law of nations, or under color thereof."<sup>10</sup> In the latter case the Supreme Court may have jurisdiction to review the decision of the Circuit Court of Appeals upon an appeal from an order of a district judge as well as from an order of a District or Circuit Court.<sup>11</sup> Appeals from the judgments and orders of the District Courts and of the district judges, upon writs of *habeas corpus*, must be taken within six months from the judgment or order of which complaint is made.<sup>12</sup> It may be held that the same limitation applies to appeals from orders or judgments of the Circuit Courts of Appeals which review decisions of the District Courts and district judges;<sup>13</sup> perhaps to all appeals in *habeas corpus* cases. The Supreme Court may by *certiorari* review any decision of a Circuit Court of Appeals in such a case; and a Circuit Court of Appeals may certify to the Supreme Court any questions or propositions of law arising therein, concerning which it desires instruction.<sup>14</sup> No appeal lies to the Supreme Court from a decree, judgment or order of a court of the District of Columbia upon a writ of *habeas corpus*.<sup>15</sup>

Upon an appeal from a decision upon an application for the writ of *habeas corpus*, the appellate court has the power to review the decision below upon the facts as well as the law;<sup>16</sup>

<sup>9</sup> In re Lennon, 150 U. S. 393.

<sup>10</sup> U. S. R. S., § 763.

<sup>11</sup> Ibid.

<sup>12</sup> 27 St. at L. 751; In re Lennon, 150 U. S. 393.

<sup>13</sup> Ibid.

<sup>14</sup> 26 St. at L. 826, § 6; Lau Ow Bew v. U. S., 144 U. S. 67.

<sup>15</sup> Cross v. Burke, 146 U. S. 82.

<sup>16</sup> In re Neagle, 135 U. S. 1, 42.

but not the power to review the decision of disputed questions of fact by a tribunal or magistrate whose decision is brought before it collaterally.<sup>17</sup> No new evidence can be offered upon such an appeal, except such evidence as was offered and excluded in the court below.<sup>18</sup> Pending an appeal from a final decision declining to grant a writ of *habeas corpus*, the custody of the prisoner must not be disturbed.<sup>19</sup> Pending an appeal from a final decision discharging the writ after it has been issued, the prisoner must be remanded to the custody from which he was taken, unless for good cause shown he is detained in the custody of the court or judge that granted the writ, or is enlarged upon recognizance, as described in the next sentence.<sup>20</sup> Pending an appeal from the final decision of any court or judge discharging a prisoner upon *habeas corpus*, he must be enlarged upon recognizance for appearance to answer the judgment of the appellate court, with a surety, unless for special reasons surety is not required.<sup>21</sup> Pending such proceedings and appeal and until final judgment therein, and after final judgment of discharge, any proceeding for any matter so heard and determined, or in process of being heard and determined, taken in any State court or by or under the authority of any State, against the person whose body is the subject of the writ, is null and void.<sup>22</sup> The next friend of an alleged lunatic was allowed to take an appeal from a judgment remanding him to an insane asylum, and to prosecute the same until a guardian was appointed.<sup>23</sup> An appeal can be taken from an order refusing to grant the writ in the same manner as from an order refusing to discharge the prisoner upon the return.<sup>24</sup> A Circuit Court refused to allow an appeal from an order denying the

<sup>17</sup> *Benson v. McMahon*, 127 U. S. 457.

<sup>18</sup> *Seavey v. Seymour*, 3 Cliff. 489.

<sup>19</sup> S. C. Rule 34, 117 U. S. 708; U. S. R. S., § 765. But see *King v. McLean Asylum of Mass. Gen. Hospital* (C. C. A.), 64 Fed. R. 325. Pending an appeal from the denial of the writ, there will be no interference by the Federal court with the requirement by the State authorities that the prisoner perform hard labor. In *re McKane*, 61 Fed. R. 28, 205.

<sup>20</sup> S. C. Rule 34, 117 U. S. 708; U. S. R. S., § 765.

<sup>21</sup> S. C. Rule 34, 117 U. S. 708; U. S. R. S., § 765.

<sup>22</sup> U. S. R. S., § 766. See *Ex parte Jugiro*, 44 Fed. R. 754.

<sup>23</sup> *King v. McLean Asylum of Mass. Gen. Hospital* (C. C. A.), 64 Fed. R. 325.

<sup>24</sup> *Ex parte Snow*, 120 U. S. 274.

writ in a capital case where the conviction had been affirmed by the Supreme Court of the United States and the case was clearly frivolous.<sup>25</sup> Security for costs is required upon such an appeal.<sup>26</sup> It is more appropriate and orderly for the State court to defer action in such a case until the mandate of the Supreme Court has been issued and filed in the Circuit Court; but after judgment has been entered in the Supreme Court, an order of the State court is not void; although the State court then acts at the risk that its orders may be controlled, and if need be annulled, if the Supreme Court during the term should suspend or set aside its own judgment.<sup>27</sup> Other proceedings upon such an appeal, including the time when the transcript is to be filed in the appellate court, are regulated by the court or judge hearing the cause.<sup>28</sup> The appeal may thus be heard at a term pending when it is taken.<sup>29</sup> No writ of error lies to the order or judgment of a Circuit Court upon an application for a writ of *habeas corpus*.<sup>30</sup>

§ 368a. Writs of quo warranto.—The better opinion is that the courts of the United States have original jurisdiction to grant the writ of *quo warranto* only when specifically authorized by statute; and that no writ of *quo warranto* can issue to try the title to the office of President of the United States.<sup>1</sup> The Revised Statutes provide that “whenever any person holds office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution, the district attorney for the district in which such person holds office shall proceed against him by writ of *quo warranto*, returnable to the Circuit or District Court of the United States in such district,

<sup>25</sup> In re Durrant, 84 Fed. R. 814.

<sup>26</sup> In re Newman, 79 Fed. R. 615.

<sup>27</sup> In re Shibuya Jugiro, 140 U. S. 291, 296; Lambert v. Barrett, 139 U. S. 660.

<sup>28</sup> U. S. R. S., § 768. But see Ex parte Jugiro, 44 Fed. R. 754, cited *supra*, § 867, note 9.

<sup>29</sup> Roberts v. Reilly, 110 U. S. 80.

<sup>30</sup> In re Morrissey, 187 U. S. 157, 158; In re Neagle, 185 U. S. 1, 42.

§ 368a. <sup>1</sup>This was the opinion of Hon. David Dudley Field, as ex-

pressed before the Electoral Commission in 1876. Proceedings of Electoral Commission, pp. 42, 43; 2 Field's Speeches & Papers, 405. He expressed the same opinion in Congress. 2 Field's Speeches & Papers, pp. 414-417. Charles O'Connor gave Samuel J. Tilden an opinion to the same effect. Senator Matthew H. Carpenter expressed the opposite view in his argument before the Electoral Commission. Proceedings of Electoral Commission, pp. 272, 273.

and prosecute the same to the removal of such person from office.”<sup>2</sup>

It has been said that the jurisdiction here conferred is limited to those actions in which the sole question as to the title to an office arises from the denial to citizens of the right to vote on account of their race, color, or previous condition of servitude.<sup>3</sup>

A civil action in the nature of a *quo warranto* to try the right to exist as a corporation or to annul a corporate charter may be removed to the Circuit Court of the United States, if the defendant has a defense founded upon the Constitution or a statute of the United States.<sup>4</sup>

A writ of error from the Supreme Court of the United States will issue in a case otherwise within its appellate jurisdiction to the judgment of a State court, removing or refusing to remove a person from a State office in an action in the nature of a *quo warranto*, even when the office is that of Governor of such State.<sup>5</sup> In such a case where a judgment of the State court removes a State officer and thereby vacates the office, and a writ of error from the Supreme Court is allowed for the reversal of the judgment, the person appointed to the vacancy with knowledge of the grant of the writ of error on the part of the judge of the Supreme Court of the State making the appointment, but before the filing of the writ in the clerk's office where the record remains, is guilty of no contempt of the Supreme Court in assuming to perform the duties of the office.<sup>6</sup> It has been held that an action of *quo warranto* to try the title of a citizen of another State to an office in a corporation of the State where the suit is brought, cannot be removed into a Federal court because of a difference of citizenship between the defendant and the relator.<sup>7</sup> Orders have been granted by a District Court to compel persons claiming still to be district attorney and marshal to deliver the official books and papers in their possession to others who had been appointed by the President to succeed them, and whose title they disputed.<sup>8</sup>

<sup>2</sup> U. S. R. S., § 186. Cf. U. S. R. S., Boyd v. Nebraska, 143 U. S. 135. See § 2010, repealed by 28 Stat. at L. 36; the vigorous dissenting opinion of Ex parte Warmouth, 17 Wall. 64. Mr. Justice Field in the latter case.

<sup>3</sup> Johnson v. Jumel, 3 Woods, 69.

<sup>6</sup> Foster v. Kansas, 112 U. S. 201.

<sup>4</sup> Ames v. Kansas, 111 U. S. 449; State of Illinois v. Illinois Cent. R. Co., 33 Fed. R. 721.

<sup>7</sup> Place v. Illinois (C. C. A.), 69 Fed. R. 481.

<sup>8</sup> In re Parsons, 150 U. S. 150; In re

<sup>5</sup> Foster v. Kansas, 112 U. S. 201; Nissinger, Ibid.

In an action in the nature of a *quo warranto* to try the title to an office, the amount of salary for the term as to which the dispute exists is the value of the subject-matter in dispute.<sup>9</sup>

The Supreme Court of the District of Columbia has jurisdiction to try the title to a municipal office in the District by an action in the nature of a *quo warranto*.<sup>10</sup> The extent of the jurisdiction of the Supreme Court of the District of Columbia to issue the writ of *quo warranto* is uncertain.<sup>11</sup> It has been held that a writ of *quo warranto* to try the title to an office cannot be issued except at the instance of the United States, even by the consent of both parties.<sup>12</sup>

A writ of *quo warranto* in a Territorial court to test the right of the defendant to exercise the functions of a Territorial judge, cannot be brought in the name of the Territory.<sup>13</sup> It must be brought in the name of the United States.<sup>14</sup>

§ 368b. Writs of scire facias.—A *scire facias* is a judicial writ founded on some matter of record, as a judgment, recognizance, or letters-patent, on which it lies either to enforce the execution of them or to vacate or set them aside.<sup>1</sup> In England a *scire facias* was the usual proceeding to repeal a patent, and was brought in chancery where the patent was of record.<sup>2</sup> In the United States a writ of *scire facias* is not in use as a chancery proceeding; and the appropriate method to obtain the vacation of a patent is by a bill in equity brought by the United States.<sup>3</sup> In one case a writ of *scire facias* to forfeit the title of a corporation to lands was maintained.<sup>4</sup> Although in strictness a *scire facias* is not an original but is merely a judicial writ, in a certain degree it is in the nature of an original, and is so far an original that the defendant may plead to it, and that in the common law a plea of a release of all causes

<sup>9</sup> Gorman v. Havird, 141 U. S. 206.

<sup>10</sup> U. S. v. Addison, 6 Wall. 291.

<sup>11</sup> See the remarks of Mr. Justice Bradley in the Proceedings before the Electoral Commission, p. 48.

<sup>12</sup> Wallace v. Anderson, 5 Wheat. 291.

<sup>13</sup> Territory v. Lockwood, 8 Wall. 286.

<sup>14</sup> Ibid.

§ 368b. <sup>1</sup> 2 Sellon's Pr. 187; Winder v. Caldwell, 14 How. 434, 442.

<sup>2</sup> Atty. Gen. v. Vernon, 1 Vernon, 277, 282; King v. Butler, 3 Levinz, 220; Mowry v. Whitney, 14 Wall. 434, 440.

<sup>3</sup> Mowry v. Whitney, 14 Wall. 434; U. S. v. Am. Bell Tel. Co., 128 U. S. 815; U. S. v. Stone, 2 Wall. 525. See Pennsylvania ex rel. Atty. Gen. v. Boley, 1 Weekly Notes, 302.

<sup>4</sup> Vermont v. Society for the Propagation of the Gospel, 1 Paine, 652.



and executions was a good plea in bar to a *scire facias*, and concluded "if the plaintiff ought to have or maintain his action," etc.<sup>5</sup> It has been held that a writ of *scire facias* founded upon a claim to a mechanics' lien filed in accordance with the act of March 2, 1883,<sup>6</sup> may be maintained without any declaration, provided that the writ recites the bill of particulars of the plaintiff's claims as filed;<sup>7</sup> that a Federal court in Pennsylvania has jurisdiction to grant the writ of *scire facias sur mortgage*, according to the form of practice prescribed by the State statute;<sup>8</sup> and that in Illinois a writ of *scire facias* will not lie to foreclose a mortgage not duly acknowledged.<sup>9</sup> The writ of *scire facias* was issued to revive and obtain execution against the taxing district of Shelby county, which was the successor of the city of Memphis, on a judgment recovered against the city of Memphis before the repeal of its charter.<sup>10</sup> In that case, the order upon the return of the *scire facias* awarded execution for the amount of the original judgment, and simple interest, "which is, however, to be calculated in the marshal's office on the execution as in all cases."<sup>11</sup> A *scire facias* has been issued to show cause why execution should not be taken *de bonis propriis*;<sup>12</sup> and to enforce the liability of the indorser of a writ for costs.<sup>13</sup> The right to a writ of mandamus for the enforcement of a judgment is equivalent to the right to issue an execution thereon for the purpose of an application to revive the judgment on *scire facias*.<sup>14</sup> The writ to collect a judgment of the Federal court when issued against the representatives of one of the original parties, or against the indorser of a writ, is a continuance of the original action,<sup>15</sup> and an ancillary proceeding which can be maintained irrespective of the citizenship of the parties or the amount in controversy.<sup>16</sup>

"The writ of *scire facias* is no more an execution than an ac-

<sup>5</sup> Fenner v. Evans, 1 T. R. 267; Winder v. Caldwell, 14 How. 434, 443; 2 Sellon's Pr. 187.

<sup>6</sup> 4 St. at L. 659.

<sup>7</sup> Winder v. Caldwell, 14 How. 434, 435, 443.

<sup>8</sup> Black v. Black, 74 Fed. R. 978.

<sup>9</sup> Kenosha & R. R. Co. v. Sperry, 3 Biss. 309.

<sup>10</sup> Grantland v. Memphis, 12 Fed. R. 287.

<sup>11</sup> Grantland v. Memphis, 12 Fed. R. 287, per Hammond, J.

<sup>12</sup> Teasdale v. Branton, 2 Hayw. 377.

<sup>13</sup> Pullman's P. C. Co. v. Washburn, 66 Fed. R. 790.

<sup>14</sup> Wonderly v. Lafayette County, 74 Fed. R. 702.

<sup>15</sup> McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187.

<sup>16</sup> Pullman's P. C. Co. v. Washburn, 66 Fed. R. 790; *supra*, § 21.

tion of debt would have been."<sup>17</sup> It has been held: that in a *scire facias* to revive a judgment in an ejectment, the statement that the term recovered is yet unexpired is sufficient; and that there is no need of stating in the writ the term as laid in the declaration, nor the facts which show its continuance;<sup>18</sup> that to a *scire facias* to revive a judgment in ejectment it is not necessary to make the executor or administrator of the deceased defendants parties, but that the judgment must be revived against the heirs of the defendant in ejectment and the terretenants;<sup>19</sup> that after a conveyance by the lessor of the plaintiff in ejectment to a third person of land for which judgment has been obtained, a *scire facias* or writ of *habere facias* must issue in the name of the original plaintiff in the original judgment.<sup>20</sup> A *scire facias* to show cause why a forfeiture of lands for failure to perform a condition in the grant requiring cultivation should not be enforced, containing an express averment that the lands had not been cultivated, was held sufficient.<sup>21</sup> Averments in such a writ tending to show a violation of its charter by a corporation in matters not affecting the grant of such land, were disregarded as irrelevant, since such matter, it was held, could only be pleaded in a direct proceeding to vacate the charter of the corporation,<sup>22</sup> and a general allegation of non-performance of the conditions of the grant of the lands was construed as having reference to the violations which were specifically pleaded.<sup>23</sup> A demurrer to a writ of *scire facias* to revive a judgment in ejectment raises only questions of law on the facts stated in the writ; and consequently no presumption from lapse of time against the judgment on which the writ was issued can be considered, in a State where there is no Statute of Limitations to the revival of a judgment, and lapse

<sup>17</sup> *Deneale v. Stump*, 8 Pet. 526, 528, 531, per Marshall, C. J.; *Hatch v. Eustis*, 1 Gall. 160; *McKnight v. Craig's Adm'rs*, 6 Cranch, 188.

<sup>18</sup> *Lessee of Walden v. Craig's Heirs*, 14 Pet. 147, 151.

<sup>19</sup> *Lessee of Walden v. Craig's Heirs*, 14 Pet. 147.

<sup>20</sup> *Penn v. Klyne*, Pet. C. C. 446. Under the practice in Missouri, a writ of *scire facias* to revive a judgment which has been assigned is not de-

murrable because issued in the name of the assignor; but it is sufficient if the writ shows that it was issued on behalf of, and to the use of, the assignee, and permission may be given to amend the writ by striking out the name of the assignor. *Wonderly v. Lafayette County*, 74 Fed. R. 702.

<sup>21</sup> *Vermont v. Society for Propagation of the Gospel*, 1 Paine, 652.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*



of time can operate as a defense only by way of evidence.<sup>24</sup> The State Statute of Limitations is a defense to a *scire facias* to revive an action not founded upon a statute of the United States, or an action by the receiver of a national bank to collect a stockholder's subscription.<sup>25</sup> Where there is no declaration, a demurrer will lie to a writ of *scire facias* itself.<sup>26</sup> The declaration upon a *scire facias* is usually a copy of the writ.<sup>27</sup>

The failure of the defendant in a *scire facias* against bail to join in a demurrer interposed to one of his two pleas was held a waiver of such plea.<sup>28</sup> Upon a writ of *scire facias* to revive an action or a judgment against the personal representative of a deceased defendant, such personal representative can only plead what the decedent could have pleaded,<sup>29</sup> unless there be some matter which there was no opportunity to plead in the original action.<sup>30</sup> Upon a *scire facias* to revive a final or interlocutory judgment, the defendant cannot avail himself of matters of defense which occurred previous to the original judgment.<sup>31</sup> Nor plead a general denial.<sup>32</sup> A payment which might have been pleaded to the original *scire facias* to revive a judgment cannot be given in evidence on a second *scire facias*.<sup>33</sup> To a *scire facias* to revive a judgment in ejectment, for the term and damages, the defendant cannot plead a conveyance by the lessor of the plaintiff, made subsequent to the judgment.<sup>34</sup> If an heir sells after judgment against the executor upon the plea of *plene administravit* found for him, and before *scire facias* against the heir, the purchaser may, in the name of the heir, plead to the *scire facias* assets in the hands of the executor.<sup>35</sup> As a general rule the practice of the State where

<sup>24</sup> *Lessee of Walden v. Craig's Heirs*, 14 Pet. 147, 152.

<sup>25</sup> *Butler v. Poole*, 44 Fed. R. 586. So held of a State statute which by its terms was applicable to actions upon a judgment. *Browne v. Chavez*, 181 U. S. 68; *supra*, § 373.

<sup>26</sup> *Vermont v. Society for Propagation of the Gospel*, 1 Paine, 652.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Morsell v. Hall*, 13 How. 212.

<sup>29</sup> *McKnight v. Craig's Adm'rs*, 6 Cranch, 183, 187; *Morsell v. Hall*, 13

How. 212; *Allen v. Fairbanks*, 40 Fed. R. 188.

<sup>30</sup> *Hatch v. Eustis*, 1 Gall. 160.

<sup>31</sup> *U. S. v. Thompson*, Gilp. 614; *Morsell v. Hall*, 13 How. 212; *McKnight v. Craig's Adm'rs*, 6 Cranch, 183; *Pennock v. Gilleland*, 1 Pittsb. 37.

<sup>32</sup> *Wonderly v. Lafayette County*, 77 Fed. R. 665.

<sup>33</sup> *Hatch v. Eustis*, 1 Gall. 160; *Wilson v. Hurst*, Pet. C. C. 441; *Wilson v. Watson*, Pet. C. C. 269.

<sup>34</sup> *Penn v. Klyne*, Pet. C. C. 446.

<sup>35</sup> *Hamilton v. Jones*, 2 Hayw. 291.

the proceeding is taken will be followed in the issue and proceedings upon writs of *scire facias*.<sup>28</sup>

§ 369. **Attachment of property.**—A Federal statute passed June 1, 1872, provides that “in common-law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such Circuit or District Courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process, provided, that similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.”<sup>1</sup> Most of the Circuit and District Courts have adopted by their rules the State laws in force within their respective districts.<sup>2</sup> It has been held that such a rule need not be in writing; and that the court of review will presume that such a rule has been adopted by the trial court when there is no affirmative showing to the contrary.<sup>3</sup>

These rules and the statute do not give a Circuit or District Court power thus to acquire jurisdiction over a person not a resident of the district nor served with process therein;<sup>4</sup> but it has been held that an attachment thus levied in a suit begun in a State court without personal service will not be vacated after a removal.<sup>5</sup> It is doubtful whether the writ of attachment can be issued before jurisdiction has been obtained by service of original process.<sup>6</sup> It has been held that the Circuit

<sup>28</sup> *McKnight v. Craig's Adm'rs*, 6 Cranch, 183, 187; *Walden v. Craig*, 14 Pet. 147, 151; *Kenosha & R. R. Co. v. Sperry*, 8 Biss. 809.

§ 369. <sup>1</sup> U. S. R. S., § 915; 17 St. at L., ch. 255, p. 197. See *Schunk v. Moline M. L. S. Co.*, 147 U. S. 500.

<sup>2</sup> See, for example, the Rules of the U. S. C. C., S. D. N. Y., adopted Oct. 11, 1878, and Dec. 29, 1881.

<sup>3</sup> *Logan v. Goodwin* (C. C. A.), 104 Fed. R. 490. See also *Citizens' Bank v. Farwell* (C. C. A.), 56 Fed. R. 570.

<sup>4</sup> *Sadlier v. Fallon*, 2 Curt. 579; *Nazro v. Cragin*, 3 Dill. 474; *Chitten-*

*den v. Darden*, 4 Woods, 437; *Anderson v. Shaffer*, 10 Fed. R. 266; *Boston El. Co. v. El. G. L. Co.*, 23 Fed. R. 838; *Harland v. U. L. Tel. Co.*, 40 Fed. R. 308; *Ex parte Railroad Co.*, 103 U. S. 794.

<sup>5</sup> *Crocker Nat. Bank v. Pagentecher*, 44 Fed. R. 705; *infra*, *Vermilya v. Brown*, 65 Fed. R. 149, 383, 892.

<sup>6</sup> *Chittenden v. Darden*, 4 Woods, 437. See *Nazro v. Cragin*, 3 Dill. 474; *Treadwell v. Seymour*, 41 Fed. R. 579, and other cases cited under note 4.

Court for the Eastern District of New York has power to issue an attachment, and direct the same for service to the marshal of any district in the State.<sup>7</sup> As a general rule, actual physical possession is necessary to constitute a valid seizure under a writ of *fiery facias* or a writ of attachment, unless there be garnishee process, when service of papers on the garnishee suffices.<sup>8</sup> Where the State statutes provided for successive levies under successive writs in the order in which the writs were received by the sheriff or other officers, and for a reference to ascertain the amounts and priorities of the several attachments, it was held that a writ of attachment in the hands of the marshal of the United States might be levied *sub modo* upon property in the hands of the sheriff under a prior levy, without actual seizure by the marshal, but by a constructive seizure; and that the plaintiff, after sustaining his attachment and suit in the Federal court, might have to go into the court from which the first writ of attachment issued, and intervene to obtain the proper relief, and to assert such priority of lien as the laws of the State respecting attachment might permit.<sup>9</sup> Where the State statute permits a writ of attachment to be amended by the addition of a seal, the writ may be so amended by the Federal court after a removal.<sup>10</sup> The Federal court may permit an amendment of the affidavit on which the attachment was issued in a case where the State practice would not permit such an amendment.<sup>11</sup> The decisions of the Supreme Court of a State construing and applying its attachment laws are, in so far as they are constitutional, rules of decision in the Federal courts in like cases coming from that State.<sup>12</sup>

Neither a State nor a Federal court can attach before judgment the property of a national banking association.<sup>13</sup> Payment of the debt under attachment or garnishee process from a State court levied subsequent to the commencement of the suit in the Federal court is no defense to the latter,<sup>14</sup> and such

<sup>7</sup> Treadwell v. Seymour, 41 Fed. R. 579.

<sup>8</sup> Brooks v. Fry, 45 Fed. R. 776.

<sup>9</sup> Brooks v. Fry, 45 Fed. R. 776-778.

<sup>10</sup> Wolf v. Cook, 40 Fed. R. 432.

<sup>11</sup> Erstein v. Rothschild, 22 Fed. R. 61; Booth v. Denike, 65 Fed. R. 43; Bowden v. Burnham, 59 Fed. R. 752, 754; *supra*, § 361.

<sup>12</sup> Price v. Alder G. Con. Co. (C. C. A.), 71 Fed. R. 151.

<sup>13</sup> U. S. R. S., § 5242; Pac. Nat. Bank v. Mixter, 124 U. S. 721; Garner v. Second Nat. Bank, 66 Fed. R. 369.

<sup>14</sup> Wallace v. McConnell, 13 Peters, 186; Rosenstein v. Tarr, 51 Fed. R. 268; *supra*, § 9.

an attachment and levy have been held inoperative for any purpose.<sup>15</sup> It has been held that after an order has been entered in the Federal court directing the marshal to turn over the attached property to a claimant the sheriff may replevy such property while it is still in the marshal's possession.<sup>16</sup> A writ of error does not lie to an order quashing an attachment.<sup>17</sup>

**§ 370. Arrests.**—The Revised Statutes regulate arrests in civil actions as follows: “No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such State.”<sup>1</sup> This statute does not apply to imprisonment for failure to pay a fine<sup>2</sup> or a penalty;<sup>3</sup> nor, perhaps, to imprisonment in suits to which the United States is a party,<sup>4</sup> such as a suit to enforce a forfeiture;<sup>5</sup> nor, it has been said, to suits for torts.<sup>6</sup> “When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the Circuit Court for the district where the defendant is so

<sup>15</sup> *Mack v. Winslow*, 59 Fed. R. 816; *Gapete*, 2 Curt. 94; *Moan v. Wilmarth*, 3 W. & M. 899.

<sup>16</sup> *Daniels v. Lazarus*, 65 Fed. R. 718; *supra*, § 9.

<sup>17</sup> *Hamner v. Scott* (C. C. A.), 60 Fed. R. 843. But see *Standley v. Roberts* (C. C. A.), 58 Fed. R. 836.

§ 370. <sup>1</sup> U. S. R. S., § 900; *In re Bergen*, 2 Hughes, 513; *Low v. Duffee*, 5 Fed. R. 256; *Catherwood v.*

<sup>2</sup> *In re Sanborn*, 52 Fed. R. 583.

<sup>3</sup> *U. S. v. Walsh*, Deady, 281.

<sup>4</sup> *U. S. v. Hewes*, Crabbe, 807. But see *U. S. v. Tetlow*, 2 Lowell, 159; *In re Sanborn*, 52 Fed. R. 583, 585.

<sup>5</sup> *U. S. v. Banister*, 70 Fed. R. 44.

<sup>6</sup> *U. S. ex rel. Deinell v. Arnold*, 69 Fed. R. 987, 992. See *Stroheim v. Deinell* (C. C. A.), 77 Fed. R. 802.

held.”<sup>7</sup> “Persons imprisoned on process issuing from any court in the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restrictions.”<sup>8</sup> The effect of these provisions is to make the practice and proceedings in arrests in civil actions in the Federal, Circuit and District Courts almost exactly similar to those in the State courts held in their respective districts.<sup>9</sup>

The Revised Statutes further provide: “For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a Supreme or Superior court, chief or first judge of Common Pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested, imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk’s office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.”<sup>10</sup>

**§ 371. Consolidation at law and in equity.**—The Revised Statutes provide that when causes of a like nature or relative

<sup>7</sup> U. S. R. S., § 991.

<sup>8</sup> U. S. R. S., § 992.

<sup>9</sup> *Moan v. Wilmarth*, 8 W. & M. 399; *Gray v. Munroe*, 1 McLean, 528; *Low v. Durfee*, 5 Fed. R. 256; U. S. v. *Tellow*, 2 Lowell, 159; *In re Bergen*, 2 Hughes, 513. But see *Duncan v. Darst*, 1 How. 301; *In re Watson*

*Freeman*, 6 Curt. 491; *U. S. v. Knight*, 14 Pet. 301; *U. S. v. Arnold* (C. C. A.), 69 Fed. R. 987. For the practice in Equity, see §§ 261–263.

<sup>10</sup> U. S. R. S., § 1014. See *U. S. v. Insley* (C. C. A.), 54 Fed. R. 221; *U. S. v. Sauer*, 73 Fed. R. 671.

to the same question are pending before a court of the United States or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.<sup>1</sup> This statute has been held to apply to suits in equity as well as at law.<sup>2</sup> Where a railway company filed a bill in a State court asking that its property be placed in the hands of a receiver, and the trustee of a mortgage upon its property after removal filed a cross-bill in the Federal court to foreclose the mortgage, and then began a foreclosure suit in the State court, which was afterwards removed; the Federal court consolidated all three proceedings.<sup>3</sup> A creditor's bill in which a receiver has been appointed will ordinarily be consolidated with an ancillary foreclosure suit.<sup>4</sup> A bill filed in aid of an attachment may be consolidated with a bill to restrain the enforcement of the attachment; and the latter, if subsequently brought, will then be considered as a cross-bill to the former.<sup>5</sup> The court may refuse to consolidate two foreclosure suits, when the result would be to delay that which was first brought.<sup>6</sup> The court may order several cases involving substantially the same evidence to be tried together, and direct the jury to bring in separate verdicts.<sup>7</sup> This may be ordered in actions of ejectment by the same plaintiff claiming under the same title against several defendants;<sup>8</sup> in two suits against separate defendants for the same injury, although one is an action in tort and the

§ 371. <sup>1</sup> U. S. R. S., § 921; *U. S. v. U. P. R. Co.*, 98 U. S. 569; *Andrews v. Spear*, 4 Dill. 472; *Bank of Alexandria v. Young*, 1 Cranch, C. C. 458; *Wolverton v. Lacey*, 18 Law R. (N. S.) 672; *Weide v. Ins. Co. of N. A.*, 8 Chic. L. N. 853; *Wabash, St. L. & P. Ry. Co. v. Central Tr. Co.*, 28 Fed. R. 513; *Ferrett v. Atwill*, 4 N. Y. Leg. Obs. 215; *Holmes v. Sheridan*, 1 Dill. 351; *Young v. Grand Trunk Ry. Co.*, 9 Fed. R. 348; *Keep v. Ind. & St. L. R. Co.*, 10 Fed. R. 454; *Davis v. St. Louis & S. F. Ry. Co.*, 25 Fed. R. 786.

<sup>2</sup> *Andrews v. Spear*, 4 Dill. 472;

*Wabash, St. L. & P. Ry. Co. v. Central Tr. Co.*, 28 Fed. R. 513.

<sup>3</sup> *Wabash, St. L. & P. Ry. Co. v. Central Tr. Co.*, 28 Fed. R. 513.

<sup>4</sup> *Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co. (C. C. A.)*, 95 Fed. R. 497. See *Central Tr. Co. v. McGeorge*, 151 U. S. 129.

<sup>5</sup> *Lant v. Kinne (C. C. A.)*, 75 Fed. R. 636.

<sup>6</sup> *Mercantile Tr. Co. v. Mo., K. & T. Ry. Co.*, 41 Fed. R. 8.

<sup>7</sup> *Keep v. I. & St. L. R. Co.*, 10 Fed. R. 454.

<sup>8</sup> *Ibid.*



other on contract;<sup>9</sup> when several actions are brought between the same parties upon different notes with the same makers, payees, and indorsers;<sup>10</sup> and where several actions at common law are based upon insurance policies on the same life<sup>11</sup> or the same property,<sup>12</sup> and the defenses are the same. A consolidation was refused when several actions were pending between the same parties upon assigned claims for overcharges.<sup>13</sup> The consolidation of two suits will not prevent the subsequent remand of one of them which has been improperly removed;<sup>14</sup> nor the right to dismiss either of them.<sup>15</sup> It has been said that a consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. The consolidation does "not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits. The parties in one suit do not thereby become parties in the other, and a decree in one is not a decree in the other unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense."<sup>16</sup>

§ 372. Evidence, testimony, depositions and inspection.—The Revised Statutes provide that, except in cases where depositions are authorized to be taken and used, "the mode of proof in the trial of actions at common law shall be by oral testi-

<sup>9</sup> Ibid.

<sup>10</sup> *Davis v. St. Louis & S. F. Ry. Co.*, 25 Fed. R. 786.

<sup>11</sup> *Mutual L. L. Co. v. Hillmon*, 145 U. S. 285. In this case it was held that each defendant was entitled to three separate peremptory challenges.

<sup>12</sup> *Falls of Neuse Mfg. Co. v. Ga. Home I. Co.*, 26 Fed. R. 1. In that case, where the policies contained a clause for contribution, the court ordered: that one of the causes be transferred to the equity docket, and the other defendants be made parties thereto; that the pleadings in that case be reformed according to the equity practice; and that the

proceedings in the other causes be stayed.

<sup>13</sup> *Davis v. St. Louis & S. F. Ry. Co.*, 25 Fed. R. 786.

<sup>14</sup> *Colburn v. Hill* (C. C. A.), 101 Fed. R. 500.

<sup>15</sup> *Young v. Grand Trunk Ry. Co.*, 9 Fed. R. 848.

<sup>16</sup> *Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co.* (C. C. A.), 95 Fed. R. 497, 506, per Lawton, J., citing *Brevard v. Summar*, 2 Heisk. (Tenn.) 97, 105; *Lofland v. Coward*, 12 Heisk. (Tenn.) 546. But see *Ross-Meehan B. S. F. Co. v. So. M. Iron Co.*, 72 Fed. R. 957.

mony, and the examination of witnesses in open court.”<sup>1</sup> The trial judge may allow a witness to give testimony in a narrative form; and if such a witness states irrelevant or incompetent matter it is the duty of the injured party to arrest the narrative and move to have the irrelevant matter stricken out.<sup>2</sup> State statutes regulating the competency of proof, such as the statute of Georgia making an assignment or indorsement of a promissory note sufficient evidence of its transfer without proof of the handwriting of the indorser or assignor;<sup>3</sup> the statute of Mississippi authorizing the admission in evidence of a notarial certificate;<sup>4</sup> and the statutes of Minnesota and New York regulating the manner of proving a foreign law, will be followed in actions at common law in the Federal courts held in such States;<sup>5</sup> unless they conflict with the Federal statute providing that “in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, or to any transaction with or statement by the testator, intestate, or ward, unless called to testify by the opposite party, or required to testify thereto by the court.”<sup>6</sup> A State statute excluding the testimony of a physician as to information acquired while attending a patient in a professional capacity will be followed in an action at common law in a Federal court held in such State;<sup>7</sup> but the Federal courts will not follow a State

§ 372. <sup>1</sup> U. S. R. S., § 867. See *Ex parte Fiske*, 118 U. S. 713; *Beardsley v. Littell*, 14 Blatchf. 102.

<sup>2</sup> *N. Pac. R. Co. v. Charles* (C. C. A.), 51 Fed. R. 562, 571. In the absence of a statute, as a general rule, the genuineness of handwriting cannot be determined by comparing it with any other handwriting of the party except other papers admitted to be in his handwriting, which are in evidence for some other purpose. *Hickory v. U. S.*, 151 U. S. 803. See *Moore v. U. S.*, 91 U. S. 271; *Rogers v. Ritter*, 12 Wall. 317. It has been held that an expert may properly be asked,

“whether the defective work and condition of the mill was owing to defective construction or want of skill or management on the part of defendants.” *Chandler v. Thompson*, 80 Fed. R. 88, 41.

<sup>3</sup> *M’Niel v. Holbrook*, 12 Pet. 84, 88.

<sup>4</sup> *Sims v. Hundley*, 6 How. 1.

<sup>5</sup> *Pierce v. Indreth*, 106 U. S. 546; *Calderon v. O’Donohue*, U. S. C. C., S. D. N. Y., per Wheeler, D. J., June, 1891.

<sup>6</sup> U. S. R. S., § 858. See authorities cited *supra*, § 274.

<sup>7</sup> *Conn. Mut. Ins. Co. v. Union Tr. Co.*, 112 U. S. 250.



statute allowing confidential communications between attorney and client to be put in evidence.<sup>8</sup>

The power of the Circuit and District Courts to make rules regulating the taking of testimony in actions at common law, has been denied.<sup>9</sup>

The act of March 9, 1882, provides "that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held."<sup>10</sup> Before this statute it was held that no form of examination or deposition unknown to the common law and not authorized by a Federal statute, even though — as the examination of a party before trial,<sup>11</sup> or the filing of interrogatories with a complaint<sup>12</sup> — authorized by a statute of the State where the court is held,<sup>13</sup> would be followed by a Federal court in either an action at common law or a suit in equity;<sup>14</sup> and that an order of a State court directing such an examination was avoided by the removal of the case.<sup>15</sup> In the Second Circuit it was held that an order could be granted for the examination of a party to an action at common law, in accordance with the State statute, to enable the opposite party to frame his pleading.<sup>16</sup> In the Eighth Circuit it was held that the defendant could not be compelled to answer interrogatories attached to the plaintiff's common-law petition in accordance with the State practice.<sup>17</sup> In the absence of a statute, a court of the United States has no power to order a plaintiff in an action for personal injuries to submit to a physical examination in

<sup>8</sup> Conn. Mut. Ins. Co. v. Schaefer, 94 U. S. 457; Liggett v. Glenn, 51 Fed. R. 381, 394; *supra*, § 274.

<sup>9</sup> Randall v. Venable, 17 Fed. R. 163; Flint v. Board of Com'rs, 5 Dill. 481; McLennon v. Kansas City, St. J. & C. B. R. Co., 22 Fed. R. 198. *Contra*, Warren v. Younger, 18 Fed. R. 859.

<sup>10</sup> 27 St. at L. 7. See *supra*, §§ 283, 286, 289.

<sup>11</sup> *Ex parte Fisk*, 113 U. S. 713. But see Bryant v. Leyland, 6 Fed. R. 125; Lowrey v. Kusworm, 66 Fed. R. 539.

<sup>12</sup> Tabor v. Indianapolis Journal Newspaper Co., 66 Fed. R. 423.

<sup>13</sup> U. S. v. Fifty Boxes and Packages of Lace, 92 Fed. R. 601.

<sup>14</sup> *Ex parte Fisk*, 113 U. S. 713. See *supra*, §§ 283, 286, 289.

<sup>15</sup> *Ex parte Fisk*, 113 U. S. 713.

<sup>16</sup> Anderson v. Mackay, 46 Fed. R. 105. But see Marvin v. C. Aultman & Co., 46 Fed. R. 338.

<sup>17</sup> Pierce v. Union Pac. Ry. Co., 47 Fed. R. 709.

advance of the trial,<sup>18</sup> but a State statute authorizing such an examination is constitutional and will be followed.<sup>19</sup>

It was formerly held, in the Southern District of New York, that inspection of a document before trial at common law could only be obtained by a bill of discovery, not by an order, in accordance with the State practice.<sup>20</sup> It has been held that the State practice should now be followed.<sup>21</sup> The Revised Statutes provide that on the trial of an action at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.<sup>22</sup> If a plaintiff fails to comply with such an order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.<sup>23</sup> It has been held at circuit that this practice will be followed in equity.<sup>24</sup> The pendency of a bill of discovery is not a bar to such a motion in an action at law.<sup>25</sup> The order will not be granted unless the applicant shows that the paper exists and is pertinent to the issue, and in the possession of the other party;<sup>26</sup> and he must show the grounds of his belief upon the subject.<sup>27</sup> The order may be absolute or con-

<sup>18</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250.

<sup>19</sup> *Camden & S. Ry. Co. v. Stetson*, 177 U. S. 172. *Cf.* *Montana Co. v. St. Louis M. & M. Co.*, 152 U. S. 160; *Lyon v. Manhattan Ry. Co.*, 142 N. Y. 298; *McGovern v. Hope*, 63 N. J. Law, 76, 42 Atl. R. 880.

<sup>20</sup> *Guyot v. Hilton*, 82 Fed. R. 748; *Colgate v. Compagnie Française*, 23 Fed. R. 82. But see *Coit v. North Carolina G. Amal. Co.*, 9 Fed. R. 577.

<sup>21</sup> *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.*, 98 Fed. R. 175; *Filscole v. Lancaster*, 70 Fed. R. 387. *Contra*, *Lucker v. Phoenix Assur. Co.*, 67 Fed. R. 18.

<sup>22</sup> U. S. R. S., § 724. See *supra*, § 267. The court may thus compel

the production of accounts of sales in an action to recover royalties. *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. R. 46.

<sup>23</sup> U. S. R. S., § 724.

<sup>24</sup> *Coit v. North Carolina G. Amal. Co.*, 9 Fed. R. 577; *Ryder v. Bateman*, 98 Fed. R. 81. But see *Guyot v. Hilton*, 82 Fed. R. 748; *Colgate v. Compagnie Française*, 23 Fed. R. 82; *Bischoffsheim v. Brown*, 29 Fed. R. 341. See *supra*, § 267.

<sup>25</sup> *Iasigi v. Brown*, 1 Curt. 401.

<sup>26</sup> *Ibid.*; *Triplett v. Bank of Washington*, 8 Cranch, C. C. 646; *Jacques v. Collins*, 2 Blatchf. 28; *Buell v. Conn. Mut. L. Ins. Co.*, 1 Cin. L. R. 51; *Bas v. Steele*, 8 Wash. 881.

<sup>27</sup> *Caspary v. Carter*, 84 Fed. R. 416.

ditional.<sup>28</sup> A motion made at the trial is too late.<sup>29</sup> If the notice was not served a sufficient length of time before the trial, the trial may be postponed.<sup>30</sup> It has been held that under this statute the court may order inspection before the trial with permission to take a copy.<sup>31</sup> It has been said that the order should not be made against a corporation, the proper remedy in such a case being a *subpoena duces tecum* served on one of its officers.<sup>32</sup> It has been said to be very doubtful whether the court has the power to compel a party to permit the inspection of articles, other than books, writings, or drawings, in his possession; although if such articles are produced on the trial the court may then permit the application of chemical tests to them;<sup>33</sup> but it has been held that inspection of a mine may be ordered in a proceeding against a receiver.<sup>34</sup> It seems that a party cannot be compelled by a *subpoena duces tecum* to produce such articles upon the trial.<sup>35</sup> When a party inspects a paper produced by his adversary at his request and then fails to offer it in evidence, his adversary may put it in evidence.<sup>36</sup> When, before the submission of a case to the jury, irrelevant evidence,

<sup>28</sup> *Dunham v. Riley*, 4 Wash. 126; *Iasigi v. Brown*, 1 Curt. 401; *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201.

<sup>29</sup> *Sampson v. Johnson*, 2 Cranch, C. C. 107; *Bank of U. S. v. Kurtz*, 2 Cranch, C. C. 342.

<sup>30</sup> *Geyger v. Geyger*, 2 Dall. 332; *Bank of U. S. v. Kurtz*, 2 Cranch, C. C. 342.

<sup>31</sup> *Exchange Nat. Bank v. Wichita Cattle Co.*, 61 Fed. R. 190; *Central Nat. Bank v. Tayloe*, 2 Cranch, C. C. 427; *Jacques v. Collins*, 2 Blatchf. 23; *Gregory v. Chicago, M. & St. P. R. Co.*, 10 Fed. R. 529; *Lucker v. Phoenix Assur. Co.*, 67 Fed. R. 18; *Victor G. Bloede Co. v. Joseph Bancroft & Sons*, 98 Fed. R. 175. *Contra*, *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201; *Iasigi v. Brown*, 1 Curt. 401; *Triplett v. Bank*, 3 Cranch, C. C. 646. It has been held that the order may require that the documents be filed with the clerk, or that copies of them be served on the party

seeking them. *Jacques v. Collins*, 2 Blatchf. 23.

<sup>32</sup> *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201. *Contra*, *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. R. 46; *Exchange Nat. Bank v. Wichita Cattle Co.*, 61 Fed. R. 190. It has been held that a stockholder has the right to inspect the corporate bonds in the hands of a receiver in order to obtain material to approve a scheme of reorganization; provided that he acquired his stock before the receivership. *Chable v. Nicaragua Canal Const. Co.*, 59 Fed. R. 846.

<sup>33</sup> *Lundberg v. Albany & R. I. & S. Co.*, 32 Fed. R. 501; *Johnson S. S. R. Co. v. N. B. S. Co.*, 48 Fed. R. 191, 194, 195.

<sup>34</sup> *Henszey v. Langdon-Henszey C. Min. Co.*, 80 Fed. R. 178.

<sup>35</sup> *In re Shephard*, 3 Fed. R. 12; *Johnson S. S. R. Co. v. N. B. S. Co.*, 48 Fed. R. 191, 194, 195. See *supra*, §§ 275, 277.

<sup>36</sup> *Edison El. L. Co. v. U. S. El. L. Co.*, 45 Fed. R. 55.

previously admitted, was withdrawn, and the jury was instructed to disregard it, it was held that an exception to its admission could not be sustained.<sup>37</sup>

§ 373. **Abatement and revivor.**—The Revised Statutes provide that when either of the parties to a suit in any court of the United States dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment.<sup>1</sup> “The defendant shall answer accordingly, and the court shall hear and determine the cause, and render judgment for or against the executor or administrator as the case may require.”<sup>2</sup> If the survivor wishes to continue the suit, he must serve the executor or administrator with a *scire facias*, issued from the clerk’s office where the case is pending; and if such personal representative fails to become a party to the suit within twenty days from the service of such writ, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party.<sup>3</sup> The executor or administrator who thus becomes a party is entitled, upon motion, to a continuance till the next term of the court.<sup>4</sup> The Revised Statutes further provide that if there are two or more plaintiffs or defendants in a suit, where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the suit and action do not thereby abate; but such death must be suggested in the record, and the action thereupon proceed at the suit of the surviving plaintiff against the surviving defendant.<sup>5</sup> The practice under, and the construction of, the statutes are not clear; but the following points seem settled. The latter statute applies to writs of error<sup>6</sup> and appeals.<sup>7</sup> These statutes do not apply to real actions.<sup>8</sup> Real actions cannot be revived,<sup>9</sup> unless the State stat-

<sup>37</sup> *Pennsylvania Co. v. Roy*, 102 U. S. 451. 8 & 9 W. Ill., ch. 1, § 7. See *Allen v. Fairbanks*, 40 Fed. R. 188.

§ 373. <sup>1</sup> U. S. R. S., § 955.

<sup>2</sup> U. S. R. S., § 955. See *Allen v. Fairbanks*, 40 Fed. R. 188. <sup>6</sup> *McKinney v. Carroll*, 12 Pet. 66; *Classe v. Rippon*, 1 B. & Ald. 586.

<sup>3</sup> U. S. R. S., § 955.

<sup>7</sup> *Moses v. Wooster*, 115 U. S. 285.

<sup>4</sup> U. S. R. S., § 955. See *supra*, § 368b.

<sup>8</sup> *Macker v. Thomas*, 7 Wheat. 580; *Green v. Watkins*, 6 Wheat. 260.

<sup>5</sup> U. S. R. S., § 956. This statute is substantially a copy of the act of

<sup>9</sup> *Macker v. Thomas*, 7 Wheat. 580; *Green v. Watkins*, 6 Wheat. 260.

ute so provides.<sup>10</sup> The statutes regulate the manner of revivor, and the practice which they prescribe must be followed in all cases in the Federal courts, whether arising under Federal statutes or State laws or the common law.<sup>11</sup>

The survivability of a cause of action, if it be one arising under the statute or common law of the State where the case is pending, depends on the laws of that State.<sup>12</sup> The time within which an action to enforce a cause of action not founded upon a statute of the United States may be revived, depends upon the State practice<sup>13</sup> or the State Statute of Limitations;<sup>14</sup> which, however, do not affect the United States.<sup>15</sup> The State Statute of Limitations has been held a bar to an application to revive an action by a receiver of a national banking association to collect an assessment from a stockholder.<sup>16</sup> If the cause of action be one created by a Federal statute, its survival or abatement is not affected by State statutes or decisions.<sup>17</sup> Thus, a *qui tam* action to recover a penalty under a statute of the United States abates by the death of the defendant, although the statutes of the State where the case is pending authorize the revivor of actions to recover penalties.<sup>18</sup> An action to enforce a forfeiture abates unless the acts complained

<sup>10</sup> *McArthur v. Williamson*, 45 Fed. R. 154.

<sup>11</sup> *In re Connaway*, 178 U. S. 421.

<sup>12</sup> *Warren v. Furstenheim*, 85 Fed. R. 691; *Witters v. Foster*, 26 Fed. R. 787; *Henshaw v. Miller*, 17 How. 212; *Hatfield v. Bushnell*, 1 Blatchf. 393; *Trigg v. Conway*, Hempst. 711. A State statute which allows an executor or administrator to revive an action for personal injuries will be followed, as the law of the forum, by the Federal courts there held, although there was no such statute where the accident occurred. *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226. A State statute which provided that a suit against a corporation shall not abate upon the dissolution of the defendant was held not to apply to a foreign corporation; and a judgment of the State court in such a case was held by the Federal court to be void. *Marion Phosphate Co. v. Perry* (C. C.

A.), 74 Fed. R. 425. A State statute was followed which permitted an administrator duly appointed and qualified to be substituted as plaintiff in a suit brought by a person claiming to be the personal representative of the same decedent who had never qualified as such. *Person v. Fidelity & Cas. Co.* (C. C. A.), 92 Fed. R. 965.

<sup>13</sup> *Goodyear D. V. Co. v. White*, 46 Fed. R. 278.

<sup>14</sup> *Browne v. Chavez*, 181 U. S. 68; *Butler v. Poole*, 44 Fed. R. 586; *Barker v. Ladd*, 3 Saw. 44; *Price v. Yates*, 19 Alb. L. J. 295; *Goodyear D. V. Co. v. White*, 46 Fed. R. 278.

<sup>15</sup> *U. S. v. Houston*, 48 Fed. R. 207.

<sup>16</sup> *Butler v. Poole*, 44 Fed. R. 586.

<sup>17</sup> *Schreiber v. Sharpless*, 110 U. S. 76; *May v. Logan County*, 80 Fed. R. 250.

<sup>18</sup> *Schreiber v. Sharpless*, 110 U. S. 76.

of were divisible and the wrongdoer's estate has derived a benefit therefrom.<sup>19</sup> An action for the infringement of a patent survives to the representatives of the patentee,<sup>20</sup> and against the representatives of the infringer.<sup>21</sup> Where one of several joint defendants to a decree for damages and an injunction against the infringement of a patent dies after an appeal, the suit may be revived in the appellate court at the suit of the survivors, upon notice to the personal representatives of the decedent under Supreme Court Rule 15, without bringing them in as parties.<sup>22</sup> If in such a case the personal representatives of the deceased appellant voluntarily come in and ask to be made parties, they may be admitted.<sup>23</sup> Where the presence of the personal representatives of a deceased appellant will be required for the due prosecution of an appeal by his survivors, the appellate court may order that the appeal be dismissed unless properly revived within a limited time.<sup>24</sup> Where a defendant dies after judgment, an execution issued before the judgment is revived is of no effect and all proceedings thereunder are void; unless, perhaps, when the writ was tested before the death occurred;<sup>25</sup> but the death of a judgment debtor does not affect the validity of a sheriff's deed subsequently executed, but previously ordered.<sup>26</sup> Where a judgment for a personal injury had been erroneously set aside, the appellate court ordered judgment in favor of the original plaintiff *nunc pro tunc* as of a date before his death.<sup>27</sup> An order denying a motion to dismiss an action upon the ground that it had abated by the death of the plaintiff is reviewable on a writ of error to the final judgment.<sup>28</sup>

<sup>19</sup> U. S. v. De Goer, 38 Fed. R. 80; U. S. v. Riley, 104 Fed. R. 275.

<sup>20</sup> May v. Logan County, 80 Fed. R. 250; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301. See *supra*, §§ 174-176.

<sup>21</sup> Ibid.; Head v. Porter, 70 Fed. R. 498; Hohorst v. Howard, 87 Fed. R. 97; Moses v. Wooster, 115 U. S. 285.

<sup>22</sup> Moses v. Wooster, 115 U. S. 285, 287.

<sup>23</sup> Thorpe v. Mathington, 1, Phill. Ch. 200; Moses v. Wooster, 115 U. S. 285, 288.

<sup>24</sup> Blake v. Bogle, Macq. Pr. of H. of L., 244, note; Moses v. Wooster, 115 U. S. 285, 288.

<sup>25</sup> Ransom v. Williams, 2 Wall. 313.

<sup>26</sup> Insley v. U. S., 150 U. S. 512.

<sup>27</sup> Coughlan v. District of Columbia, 106 U. S. 7. But see Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 678.

<sup>28</sup> Henderson v. Henshall (C. C. A.), 54 Fed. R. 320.



§ 374. **Trials.**—The Revised Statutes provide that the trial of issues of fact in actions at common law in the Circuit and District Courts shall be by jury.<sup>1</sup>

There is but one exception to this, namely, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury.<sup>2</sup> Then, the issues of fact may be tried and determined by a Circuit Court without the intervention of a jury; and the rulings of the court on the trial, if excepted to at the time and included in the bill of exceptions, may be reviewed in the Supreme Court upon a writ of error or appeal; and when the findings are special, the review may extend to the determination of the sufficiency of the facts found to support the judgment.<sup>3</sup>

The court's findings may be general or special,<sup>4</sup> and have the same effect as the verdict of a jury.<sup>5</sup> It seems that findings may be filed by an order of the judge who tried the case, *nunc pro tunc*, at a term subsequent to the entry of judgment on his decision.<sup>6</sup> If the stipulation is not in writing the judgment will be valid;<sup>7</sup> but the appellate court cannot reverse the same for any error in the admission or exclusion of evidence, or because the evidence was insufficient to warrant the finding of the judge, or upon any other question of law growing out of the evidence.<sup>8</sup> The most appropriate proof of a compliance

§ 374. <sup>1</sup> U. S. R. S., §§ 566, 648.

<sup>2</sup> U. S. R. S., §§ 649, 700.

<sup>3</sup> U. S. R. S., §§ 649, 700. See *Marion Phosphate Co. v. Cummer*, 60 Fed. R. 878.

<sup>4</sup> U. S. R. S., § 649; *Norris v. Jackson*, 9 Wall. 125; *Mining Co. v. Taylor*, 100 U. S. 37. A statement of facts in an opinion is not a finding. *Consol. Coal Co. v. Polar W. Ice Co.* (C. C. A.), 106 Fed. R. 798; *Lehman v. Dickson*, 148 U. S. 71. Even if it is referred to in the judgment. *Kentucky L. M. Co. v. Hamilton*, 63 Fed. R. 93. Nor is a statement of facts in a bill of exceptions a finding. *Ibid.*; *Lehman v. Dickson*, 148 U. S. 71.

<sup>5</sup> *Norris v. Jackson*, 9 Wall. 125; *U. S. v. Dawson*, 101 U. S. 569; *O'Reilly v. Campbell*, 116 U. S. 418.

<sup>6</sup> *Insurance Co. v. Boon*, 95 U. S.

117. But see *Hickman v. Fort Scott*, 141 U. S. 415. In *Lang v. Baxter*, 69 Fed. R. 905, it was held that additional findings could not be made at a subsequent term. The stipulation waives an objection that the suit should have been brought in equity and not at law, or *vice versa*, *Burton v. Platter* (C. C. A.), 58 Fed. R. 901; and any other defect in the form of the action. *Fisher v. Knight* (C. C. A.), 61 Fed. R. 491.

<sup>7</sup> *Campbell v. Boyreau*, 21 How. 228; *Bond v. Dustin*, 112 U. S. 604, 606.

<sup>8</sup> *Campbell v. Boyreau*, 21 How. 228; *Bond v. Dustin*, 112 U. S. 604; *Spalding v. Manasse*, 131 U. S. 65; *Andes v. Slauson*, 130 U. S. 435. A stipulation that the case be marked "jury waived tentatively" was held not to be in compliance with the stat-



with the statute is the inclusion of the stipulation in the judgment roll.<sup>9</sup> A statement in the finding of facts, the record of the judgment entry, or the bill of exceptions that such a stipulation was made in writing, will be sufficient proof of a compliance with the statute.<sup>10</sup> It seems that when the court has authority to refer a case, upon consent in writing only, an order that the case be referred, which expressly states that it is made "by consent of the parties," necessarily implies that such consent was in writing.<sup>11</sup>

It has been said that the court cannot examine the evidence to see whether a finding of fact is justified;<sup>12</sup> but if the uncontradicted evidence entitles a party to a judgment in his favor and he duly requests a ruling and finding to that effect, and excepts to the refusal of the court, the judgment will be reversed even if no special findings were made.<sup>13</sup> Where there is a special finding of fact sufficient to support the judg-

ute. *Merrill v. Floyd* (C. C. A.), 53 Fed. R. 172. A stipulation, which reserves the right to go to the jury in case of a certain ruling which was not made, is insufficient. *Smith v. Weeks* (C. C. A.), 53 Fed. R. 758. A stipulation cannot be amended *nunc pro tunc*. *Ibid.* For a form which was held sufficient, see *Citizens' Bank v. Farwell* (C. C. A.), 56 Fed. R. 570. For a case where the findings were held to be insufficient to support the judgment, see *Saltonstall v. Birtwell*, 150 U. S. 417. It has been held that there can be no receiver even in such a case, unless an objection and exception were duly taken in the court below. *Press v. Davis* (C. C. A.), 54 Fed. R. 267. Where the court overruled demurrers to several pleas and there were no findings, it was held that there must be a reversal if any one of the pleas was bad. *Miller v. Houston City Ry. Co.* (C. C. A.), 55 Fed. R. 866.

<sup>9</sup> *Bond v. Dustin*, 112 U. S. 604, 607.

<sup>10</sup> *Kearney v. Case*, 12 Wall. 275, 284; *Dickinson v. Planters' Bank*, 16 Wall. 250; *Bond v. Dustin*, 112 U. S.

604, 607. A statement in a bill of exceptions "that the cause came on for hearing, and a jury having been impaneled and sworn, and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury was withdrawn, trial to jury waived," was held to be insufficient to show that written stipulation was filed. *Cudahy P. Co. v. Sioux Nat. Bank* (C. C. A.), 69 Fed. R. 182.

<sup>11</sup> *Bond v. Dustin*, 112 U. S. 604, 607; *Boogher v. Insurance Co.*, 103 U. S. 90.

<sup>12</sup> *Reed v. Stopp* (C. C. A.), 52 Fed. R. 641, 644; *Tyng v. Grinnell*, 92 U. S. 467; *Dooley v. Pease*, 180 U. S. 126; *Syracuse Tp. v. Rollins* (C. C. A.), 104 Fed. R. 958.

<sup>13</sup> *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92. It seems that such a request may be too late if not made until after the judge had announced his decision. *Merrill v. Floyd* (C. C. A.), 50 Fed. R. 849, 850, per Gray, J. It has been held that there can be no reversal for a refusal to make a special finding. *Insurance Co. v. Folsom*, 18 Wall. 237.

ment, an error in the admission of evidence not affecting such finding is harmless.<sup>14</sup>

It has been held that when the parties consent that the case be referred to the judge or some one else as referee, the only question presented by the writ of error is whether there is any error of law in the judgment upon the facts as found by the referee.<sup>15</sup> Where the case was tried before a judge under an

<sup>14</sup> Reed v. Stapp (C. C. A.), 52 Fed. R. 641; Searcy County v. Thompson (C. C. A.), 66 Fed. R. 92; Rhodes v. U. S. Nat. Bank (C. C. A.), 66 Fed. R. 512; City of Key West v. Baer (C. C. A.), 65 Fed. R. 440; D. & C. F. Co. v. Gottschalk, 66 Fed. R. 609. But see Citizens' Bank v. Farwell (C. C. A.), 63 Fed. R. 117.

<sup>15</sup> Paine v. Central Vt. R. Co., 118 U. S. 152, 158; Boogher v. Insurance Co., 103 U. S. 90. See Dundee M. & Tr. Co. v. Hughes, 124 U. S. 157. A rule of the Circuit Court of the United States for the Northern, Eastern and Southern Districts of New York provides that: "In actions at law, a consent to a reference of the whole issue must likewise contain a provision that judgment shall not be entered until after ten days' notice of the filing of the report of the referee, and of the judgment proposed to be entered thereon. After a reference, at any time before the entry of judgment, either party may move for a new trial upon a case or exceptions, and if such motion be denied, the decision of the motion and the questions involved in it may be entered on the record, as if it had been a ruling made upon a trial by the judge without a jury, and excepted to in like manner. When a motion for a new trial is intended to be made, the court may extend the time for entering judgment, upon the application of the moving party, and may stay all other proceedings until the decision of the motion." 13 Blatchf. 568, 569. Cf. Chicago, M. &

St. P. Ry. Co. v. Clark, 178 U. S. 353, 364. An order of reference in accordance with this rule may be entered after the filing of the referee's report *nunc pro tunc*, in accordance with a stipulation made prior to the reference. Robinson v. Mut. Ben. L. Co., 16 Blatchf. 194, 200. After judgment, no motion for a new trial under this rule can be made. Naefie v. Cheesebrough, 14 Blatchf. 313. The court of error has thus reviewed the decision of the lower court upon a motion to strike out a notice of a termination of the reference, which was decided after the report was filed, and also the decision of a motion to set aside the report because of such a notice. Parker v. Ogdensburg, L. & L. C. R. Co. (C. C. A.), 79 Fed. R. 817. It was held that a stipulation to refer a case to a special master, and that the rights of the parties shall be the same as though the case were one within the terms of the State statute, neither enlarges nor contracts the rights of the parties with respect to a review by the Circuit Court of Appeals of a judgment on a trial without a jury, Shipman v. Ohio Coal Exchange (C. C. A.), 70 Fed. R. 652; and that an oral consent in open court to an order of reference, made pursuant to a State statute (Nebraska), will not enable the Circuit Court of Appeals in the Eighth Circuit to review the action of the Circuit Court on exceptions to the referee's report, where there is no bill of exceptions making that report, or the evidence upon which

order providing, by consent, that it be so tried, and that if it should appear to the judge that there were questions of fact, the same be subsequently submitted to a jury, it was held that the Supreme Court could not consider on appeal rulings of the judge upon the trial.<sup>16</sup> A judgment upon an agreed statement of facts presents nothing but a question of law, which may be reviewed on a writ of error.<sup>17</sup> The findings on agreed facts must consist of facts only, and not contain a recapitulation of the evidence.<sup>18</sup> Where there is no finding of facts, but merely a stipulation that certain testimony in other suits may be referred to and relied upon by either of the parties, the appellate court has no jurisdiction to determine the questions of law thereon arising.<sup>19</sup> The findings cannot be both general and special.<sup>20</sup> A special finding is controlled by a general finding for the defendant in error on all the issues; and no error can then be assigned thereto.<sup>21</sup> An order made by the court, after hearing a case without a jury taking such case under advisement, does not work a discontinuance of the suit, though a provision is added that the case is to be decided in vacation.<sup>22</sup>

There is no provision of law authorizing the review by writ of error of any errors committed on the trial of an action in a District Court tried by a judge by consent without a jury.<sup>23</sup>

A statement of facts agreed by the parties, that is a case stated, in an action at law, waives all questions of pleading, or of form of action, which might have been cured by amend-

it was founded, a part of the record. *Dietz v. Lymer* (C. C. A.), 63 Fed. R. 758. See also *Board of Com'rs of Hamilton County v. Sherwood* (C. C. A.), 64 Fed. R. 103.

<sup>16</sup> *Andes v. Slauson*, 130 U. S. 485.

<sup>17</sup> *Bond v. Dustin*, 112 U. S. 604, 607; *Supervisors v. Kennicott*, 103 U. S. 554; *U. S. v. Eliason*, 16 Pet. 291; *Burr v. Des Moines R. & Nav. Co.*, 1 Wall. 99; *Campbell v. Boyreau*, 21 How. 223, 226. But see *Glenn v. Fant*, 134 U. S. 398. When a judgment upon agreed facts is reversed because the facts stipulated were evidential only, a new trial may be ordered with liberty to each party to offer additional evi-

dence not inconsistent with the stipulation. *Burnham v. No. Chicago St. Ry. Co.* (C. C. A.), 88 Fed. R. 627.

<sup>18</sup> *Raimond v. Terrebonne Parish*, 132 U. S. 192.

<sup>19</sup> *Glenn v. Fant*, 134 U. S. 398; *Davenport v. Paris*, 136 U. S. 580.

<sup>20</sup> *Meath v. Mississippi Levee Com'rs*, 109 U. S. 268; *British Q. Min. Co. v. Baker S. Min. Co.*, 139 U. S. 222.

<sup>21</sup> *Meath v. Mississippi Levee Com'rs*, 109 U. S. 268; *British Q. Min. Co. v. Baker S. Min. Co.*, 139 U. S. 222.

<sup>22</sup> *Abraham v. Levy* (C. C. A.), 72 Fed. R. 124.

<sup>23</sup> *Rogers v. U. S.*, 141 U. S. 548.

ment; but it cannot enable a court of law to assume the jurisdiction of a court of equity.<sup>24</sup> For example, in a State where the remedy of a mortgagee against one who has covenanted with a mortgagor to pay the mortgage is in equity, a case stated cannot authorize him to sue at law.<sup>25</sup>

No State statute<sup>26</sup> or constitutional<sup>27</sup> provision regulating the manner of the trial,<sup>28</sup> or applications for postponements or continuances,<sup>29</sup> or form of a verdict,<sup>30</sup> or providing for the trial of a class of cases before a judge without a jury,<sup>31</sup> compulsory references in a special class of cases, such as an action on an account,<sup>32</sup> or limiting the powers of the judge to comment on the facts in his charge to the jury,<sup>33</sup> or directing that such charge be in writing,<sup>34</sup> has any influence upon the practice in the Federal courts. But it has been said that the sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, are matters in which the Circuit Courts of the United States are governed by the practice of the courts of the State in which they are held.<sup>35</sup> The State practice in the withdrawal of jurors may in a proper case be followed.<sup>36</sup>

The trial judge has no power to order a compulsory nonsuit,<sup>37</sup> but may dismiss the complaint if the State practice per-

<sup>24</sup> Willard v. Wood, 185 U. S. 809, 814.

<sup>25</sup> Willard v. Wood, 185 U. S. 809.

<sup>26</sup> Nudd v. Burrows, 91 U. S. 426; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.

<sup>27</sup> St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360.

<sup>28</sup> Nudd v. Burrows, 91 U. S. 426; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545; St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360.

<sup>29</sup> Texas & P. Ry. Co. v. Nelson, 50 Fed. R. 814.

<sup>30</sup> Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Abbott v. Curtis & Co. Mfg. Co., 25 Fed. R. 403; U. S. Mut. Acc. Ass'n v. Barry, 131 U. S. 100. For example, a direction that exemplary damages must be separately assessed. Times Pub. Co. v. Carlisle (C. C. A.), 94 Fed. R. 762.

<sup>31</sup> Klever v. Seawall, 65 Fed. R. 398.

<sup>32</sup> Howe Mach. Co. v. Edwards, 15 Blatchf. 402; U. S. v. Rathbone, 2 Paine, 578; Sulzer v. Watson, 89 Fed. R. 414.

<sup>33</sup> Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545; St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360; U. S. v. Phila. & R. R. Co., 123 U. S. 118; Rucker v. Wheeler, 127 U. S. 85, 93; Lovejoy v. U. S., 128 U. S. 171.

<sup>34</sup> Nudd v. Burrows, 91 U. S. 426.

<sup>35</sup> Gray, J., in Glenn v. Sumner, 132 U. S. 152, 156. See Bond v. Dustin, 112 U. S. 604; and § 360.

<sup>36</sup> Silsby v. Foote, 14 How. 218, 220.

<sup>37</sup> Elmore v. Grymes, 1 Pet. 469; D'Wolf v. Rahaud, 1 Pet. 476; Crane v. Morris, 6 Pet. 598; Silsby v. Foote, 14 How. 218; Castle v. Bullard, 23 How. 172. It has been held that, when the plaintiff fails to appear upon the trial, the proper practice is to impanel a jury and direct a ver-

mits that to be done.<sup>38</sup> The plaintiff may consent to a nonsuit;<sup>39</sup> but, according to a recent decision, after the commencement of the trial only with the leave of the court,<sup>40</sup> unless a State statute gives him an absolute right to do so.<sup>41</sup> The trial judge may direct a verdict for either party in a case where the evidence is such as to make it proper to set aside a verdict in favor of the other.<sup>42</sup> Upon a motion to direct a verdict, the grounds of the motion should be stated.<sup>43</sup> It has been said to be the better practice for the court to hear the argument and decide the motion in the absence of the jury; but the presence of the jury at comments upon the evidence, when made by the judge, is no ground for a new trial.<sup>44</sup> Such a motion cannot be granted if made before all the evidence of both parties is closed.<sup>45</sup> Where, after such a motion made at the close of the plaintiff's case has been denied, the defendant offers evidence on his own behalf, any error in denying the motion is cured.<sup>46</sup> A verdict can only be directed when no recovery could be had by the party against whom the verdict is given, upon any view which could properly be taken of the facts.<sup>47</sup> The sufficiency of the evidence to justify the verdict will not be reviewed on writ of error unless a motion for directing a verdict was made by the plaintiff in error at the conclusion of the evidence.<sup>48</sup> The judge may also comment upon the facts, provided that, when

dict for the defendant. *Patting v. Spring & C. Co.*, 98 Fed. R. 98; *Schultz v. Mut. L. Ins. Co.*, U. S. C. C. S. D. N. Y., 1881, per Shipman, J.

<sup>38</sup> *Central Transp. Co. v. Pullman's P. C. Co.*, 139 U. S. 24, 38-40.

<sup>39</sup> *Elmore v. Grymes*, 1 Pet. 469. Even, it has been held where the State practice permitted, after the judge had announced his intention to direct a verdict for the defendant but no such verdict had been made. *Chicago, M. & St. P. Ry. Co. v. Metalstaff* (C. C. A.), 101 Fed. R. 769.

<sup>40</sup> *Johnson v. Bailey*, 59 Fed. R. 670.

<sup>41</sup> *Ætna Life Ins. Co. v. Lakin* (C. C. A.), 59 Fed. R. 989.

<sup>42</sup> *Randall v. B. & O. R. Co.*, 109 U. S. 478; *Bunt v. Sierra Butte G. Min. Co.*, 138 U. S. 483; *Hathaway v. East Tenn., V. & G. R. Co.*, 29 Fed. R.

489; *Hodges v. Kimball* (C. C. A.), 104 Fed. R. 745.

<sup>43</sup> *N. Y. & T. S. S. Co. v. Anderson* (C. C. A.), 50 Fed. R. 462; *U. S. v. Bank of Metropolis*, 15 Pet. 377.

<sup>44</sup> *Illinois Cent. R. Co. v. Griffin* (C. C. A.), 80 Fed. R. 278.

<sup>45</sup> *Walker v. Windsor Nat. Bank* (C. C. A.), 56 Fed. R. 76.

<sup>46</sup> *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 204; *Northern Pac. R. Co. v. Charless* (C. C. A.), 51 Fed. R. 562, 572; *Southern Pac. Co. v. Hamilton* (C. C. A.), 54 Fed. R. 468.

<sup>47</sup> *Washington Tr. R. Co. v. McDade*, 135 U. S. 554, 571; *Dunlap v. N. E. R. Co.*, 130 U. S. 649; *Kane v. N. Central Ry. Co.*, 128 U. S. 91; *Louisville & N. R. Co. v. Woodson*, 184 U. S. 614, 621.

<sup>48</sup> *German Ins. Co. of Freeport, Ill. v. Frederick* (C. C. A.), 58 Fed. R. 144.

the evidence is conflicting, he makes it clear to the jury that they are not bound by his opinion.<sup>49</sup> Exceptions to a charge or to a refusal to charge must be noted before the jury retire.<sup>50</sup>

The court may recall a jury which has retired, and give new instructions;<sup>51</sup> and even in a criminal case where, after a trial is begun, it is discovered that a juror is disqualified, the court may, under proper circumstances, discharge the jury and order a new trial against the defendant's objections.<sup>52</sup>

The determination as to whether a witness is competent to testify as an expert rests largely in the discretion of the trial judge, and will rarely be a ground for a reversal or writ of error.<sup>53</sup> The jury may be allowed, under the custody of an officer, to leave the court room and inspect a machine or place.<sup>54</sup>

The manner of selecting and the qualifications of jurymen are prescribed by statutes of the United States.<sup>55</sup> Each party has the right to three peremptory challenges.<sup>56</sup>

A judgment will not be reversed because a party was denied the right to open and close to the jury.<sup>57</sup> In criminal cases it is customary, but, it seems, not necessary to follow the methods prescribed by the statutes of the respective States; and where there is no statute "the practice must not conflict with or abridge the right as it exists at common law."<sup>58</sup>

§ 375. Rules of decision at common law.—The Revised Statutes provide that "the laws of the several States, except

<sup>49</sup> Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545; St. Louis, L. M. & S. Ry. Co. v. Vickers, 123 U. S. 860; U. S. v. Phila. & R. R. Co., 123 U. S. 113; Rucker v. Wheeler, 127 U. S. 85, 93; Lovejoy v. U. S., 128 U. S. 171; *infra*, § 377. But see Starr v. U. S., 153 U. S. 614, 625.

<sup>50</sup> Phelps v. Mayer, 15 How. 160.

<sup>51</sup> Allis v. U. S., 155 U. S. 117.

<sup>52</sup> Thompson v. U. S., 155 U. S. 271.

<sup>53</sup> Montana Ry. Co. v. Warren, 137 U. S. 348, 353; Stillwell Mfg. Co. v. Phelps, 130 U. S. 520.

<sup>54</sup> Owens v. Mo. Pac. Ry. Co., 38 Fed. R. 571.

<sup>55</sup> U. S. R. S., §§ 800-882; Brewer v. Jacobs, 22 Fed. R. 217; Lovejoy v. U. S., 128 U. S. 171; U. S. v. Chaires,

40 Fed. R. 820; U. S. v. Paxton, 40 Fed. R. 136; U. S. v. Ewan, 40 Fed. R. 451; Ex parte Farley, 40 Fed. R. 66; Walker v. Collins, 50 Fed. R. 737; Pullman's P. C. Co. v. Harkins, 55 Fed. R. 932; Parker v. U. S., 151 U. S. 896; Turner v. U. S., 66 Fed. R. 280.

<sup>56</sup> Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285; *supra*, § 371. See Stone v. U. S. (C. C. A.), 64 Fed. R. 667.

<sup>57</sup> Hall v. Weare, 92 U. S. 728; Day v. Woodworth, 13 How. 363; Lancaster v. Collins, 115 U. S. 222. As to the power of counsel to read cases in the presence of the jury, see Hastings v. Mo. Pac. Ry. Co., 53 Fed. R. 224.

<sup>58</sup> Lewis v. U. S., 146 U. S. 370, 377, 379.



where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”<sup>1</sup> This rule applies to condemnation proceedings and to all civil proceedings in the Federal courts, except equity and admiralty cases, although they are not strictly according to the common law.<sup>2</sup> It has been held that this statute does not apply to questions of commercial law, or those which involve the application of principles of the common law which are general throughout the United States, and although settled by the decision of State courts are not regulated by a State statute. In such cases, the Federal courts are not bound by the decisions of the State courts.<sup>3</sup>

§ 375. <sup>1</sup> U. S. R. S., § 721.

<sup>2</sup> N. Y., N. H. & H. R. Co. v. Cockroft, 49 Fed. R. 3, 4, per Wheeler, J.

<sup>3</sup> Swift v. Tyson, 16 Pet. 1; Burgess v. Seligman, 107 U. S. 20, 33, 34, per Bradley, J.:

“We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State,

and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on



Such are, in the absence of State statutes upon the subject, questions in the law of insurance,<sup>4</sup> the liability for negligence

these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail." Citing *McKeen v. Delancy's Lessee*, 5 Cranch, 22; *Polk's Lessee v. Wendal*, 9 Cranch, 87; *Thatcher v. Powell*, 6 Wheat. 119; *Preston's Heirs v. Bowmar*, 6 Wheat. 580; *Daly's Lessee v. James*, 8 Wheat. 495; *Elmendorf v. Taylor*, 10 Wheat. 152; *Shelby v. Guy*, 11 Wheat. 361; *Jackson v. Chew*, 12 Wheat. 153-168; *Fullerton v. Bank of U. S.*, 1 Pet. 604; *Gardner v. Collins*, 2 Pet. 58; *U. S. v. Morrison*, 4 Pet. 124; *Green v. Neal's Lessee*, 6 Pet. 291; *Groves v. Slaughter*, 15 Pet. 449; *Swift v. Tyson*, 16 Pet. 1; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Carroll v. Safford*, 8 How. 441; *Lane v. Vick*, 8 How. 464; *Rowan v. Runnels*, 5 How.

134; *Smith v. Kernochen*, 7 How. 198; *Nesmith v. Sheldon*, 7 How. 812; *Williamson v. Berry*, 8 How. 495; *Van Rensselaer v. Kearney*, 11 How. 297; *Webster v. Cooper*, 14 How. 488; *Ohio Life Ins. & Tr. Co. v. Debolt*, 16 How. 416; *Beauregard v. New Orleans*, 18 How. 497; *Watson v. Tarpley*, 18 How. 517; *Pease v. Peck*, 18 How. 595; *Morgan v. Curtenius*, 20 How. 1; *League v. Egery*, 24 How. 264; *Suydam v. Williamson*, 24 How. 427; s. c., 6 Wall. 736; *Leffingwell v. Warren*, 2 Black, 599; *Mercer County v. Hucket*, 1 Wall. 83; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Seybert v. Pittsburgh*, 1 Wall. 272; *Havemeyer v. Iowa County*, 8 Wall. 294; *Thompson v. Lee County*, 8 Wall. 327; *Christy v. Pridgeon*, 4 Wall. 196; *Mitchell v. Burlington*, 4 Wall. 270; *Lee County v. Rogers*, 7 Wall. 181; *Butz v. City of Muscatine*, 8 Wall. 575; *City v. Lamson*, 9 Wall. 477; *Olcott v. Supervisors*, 16 Wall. 678; *Supervisors v. U. S.*, 18 Wall. 71; *Boyce v. Tabb*, 18 Wall. 546; *Pine Grove v. Talcott*, 19 Wall. 666; *Elmwood v. Marcy*, 92 U. S. 289; *State Railroad Tax Cases*, 92 U. S. 575; *Ober v. Gallagher*, 93 U. S. 199; *Town of South Ottowa v. Perkins*, 94 U. S. 260; *Davie v. Briggs*, 97 U. S. 628; *Fairfield v. County of Gallatin*, 100 U. S. 47; *Oates v. National Bank*, 100 U. S. 293; *Douglas v. County of Pike*, 101 U. S. 677; *Barrett v. Holmes*, 102 U. S. 651; *Thompson v. Perrine*, 103 U. S. 806; s. c., 106 U. S. 589.

For a full discussion of the subject, see *Holt on Concurrent Jurisdiction of the Federal and State Courts*, chs. vi and vii. See also § 298.

<sup>4</sup>*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Hening v. U. S. Ins. Co.*, 2 Dill 26.

by masters<sup>5</sup> and common carriers,<sup>6</sup> negotiable paper,<sup>7</sup> municipal bonds,<sup>8</sup> bills of lading,<sup>9</sup> master and servant,<sup>10</sup> contracts by private corporations,<sup>11</sup> the distribution of assets of insolvents before the bankruptcy law,<sup>12</sup> the liability of stockholders to creditors in the absence of any particular local statute,<sup>13</sup> private international law, or the conflict of laws,<sup>14</sup> and the measure of dam-

<sup>5</sup> *Hough v. Railway Co.*, 100 U. S. 213, 226; *Northern Pac. R. Co. v. Peterson* (C. C. A.), 51 Fed. R. 182; *Gardner v. Mich. C. R. Co.*, 150 U. S. 349; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368. So as to imputing the contributory negligence of the parent to the child. *Berry v. Lake E. & W. R. Co.*, 70 Fed. R. 679. But as to this see the *dicta* in *Kowalski v. Chicago & G. W. Ry. Co.*, 84 Fed. R. 586; s. c. (C. C. A.), 92 Fed. R. 810.

<sup>6</sup> *Myrick v. Michigan Central R. Co.*, 107 U. S. 102, 109; *Railroad Co. v. Lockwood*, 17 Wall. 357. So as to the liability of telegraph companies. *Western U. Tel. Co. v. Cook* (C. C. A.), 61 Fed. R. 624; *Western U. Tel. Co. v. Wood* (C. C. A.), 57 Fed. R. R. 471.

<sup>7</sup> *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14; *Watson v. Tarpley*, 18 How. 517; *Tilden v. Blair*, 21 Wall. 241.

<sup>8</sup> *Olcott v. Supervisors*, 16 Wall. 678; *Pine Grove v. Talcott*, 19 Wall. 666; *Venice v. Murdock*, 92 U. S. 494; *Com'rs of Johnson County v. Thayer*, 94 U. S. 631; *Cromwell v. County of Sac*, 96 U. S. 51; *Fairfield v. Gallatin County*, 100 U. S. 47; *Douglass v. Pike County*, 101 U. S. 677, 686.

<sup>9</sup> *Myrick v. Michigan Central R. Co.*, 107 U. S. 102, 109; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Pollard v. Vinton*, 105 U. S. 7. See the dissent of Field, J., in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 397, 405, 27 Am. Law Reg. 398-402.

<sup>10</sup> *Hough v. Railway Co.*, 100 U. S. 213, 226; *Coyne v. Union Pac. R. Co.*, 132 U. S. 370; *Quebec S. S. Co. v. Merchant*, 123 U. S. 375; *Newport*

*News & M. V. Co. v. Howe*, 52 Fed. R. 862, 866; s. c., 8 C. C. A. 121. But see *Kerlin v. Chicago & St. L. R. Co.*, 50 Fed. R. 185.

<sup>11</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357; *Hening v. U. S. Ins. Co.*, 2 Dill. 26; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 109.

<sup>12</sup> *London & S. F. Ry. Co. v. Willamette S. M. L. & M. Co.*, 80 Fed. R. 226.

<sup>13</sup> *Burgess v. Seligman*, 107 U. S. 20, 106; *Clark v. Bever*, 139 U. S. 96, 116. But see *Allen v. Fairbanks*, 45 Fed. R. 445, 447; *Flash v. Conn*, 109 U. S. 371. But see *Sioux City T. R. & W. Co. v. Trust Co. of N. A.*, 173 U. S. 99.

<sup>14</sup> As to the effect to be given to a statute of another State, *Greaves v. Neal*, 57 Fed. R. 816, 817; *Dygert v. Vt. L. & Tr. Co.* (C. C. A.), 94 Fed. R. 913; or of a foreign country, *Evey v. Mex. Cent. Ry. Co.* (C. C. A.), 81 Fed. R. 294. The right of a mortgagee to recover the mortgage debt from a purchaser who had agreed with the mortgagor to pay it, although the deed and mortgage were executed in and covered property solely in New York, where the mortgagee might have sued in a common-law action of assumpsit, was held, when the suit was brought in the District of Columbia, to depend upon the *lex fori*, and consequently to be maintainable only in a court of equity. *Willard v. Wood*, 135 U. S. 309. See also *North Alabama Development Co. v. Orman*, 55 Fed. R. 18; *supra*, § 7.

ages.<sup>15</sup> Thus, irrespective of the decisions of the courts of the States where they are held, the Federal courts hold: that in suits for damages by negligence the contributory negligence of the plaintiff is a defense, the burden of proving which rests upon the defendant, and that the plaintiff is not bound as a part of his case to disprove the same;<sup>16</sup> that a common carrier cannot by contract relieve himself from liability for negligence;<sup>17</sup> that a person who has received negotiable paper in payment of a pre-existing indebtedness is a holder for value;<sup>18</sup> that a purchaser of negotiable paper before maturity in good faith and for value may recover the face of the same, and not merely his purchase price;<sup>19</sup> and that parol evidence of an oral agreement made at the time of the drawing, making, or indorsing of a bill or note cannot be permitted to vary, qualify, or contradict the terms of the written contract.<sup>20</sup>

“There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.” It was accordingly held that a telegraph company was liable in damages, independent of any statute, for unjust discriminations in its charges for interstate commerce.<sup>21</sup>

<sup>15</sup> *Lake S. & M. S. Ry. Co. v. Prentice*, 147 U. S. 101.

<sup>16</sup> *Railroad Co. v. Gladmon*, 15 Wall. 401; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710.

<sup>17</sup> *Railroad Co. v. Lockwood*, 17 Wall. 857; *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174. But see *Balt. & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498.

<sup>18</sup> *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14.

<sup>19</sup> *Cromwell v. County of Sac*, 96

U. S. 51, 60; *Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 827, 843.

<sup>20</sup> *Van Vleet v. Sledge*, 45 Fed. R. 743, 749; *Specht v. Howard*, 16 Wall. 564; *Forsythe v. Kimball*, 91 U. S. 291; *White v. National Bank*, 102 U. S. 658, 661; *Martin v. Cole*, 104 U. S. 30.

<sup>21</sup> *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, per Brewer, J. See also *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. R. 24; *Du Ponceau upon Jurisdiction. Contra, Swift v. Phila. & R. R. Co.*, 58 Fed. R. 858.

“Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed within one of the States of the Union — when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application — are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court.”<sup>22</sup>

Where the decisions of the courts of a State have established a local rule of property, they will usually be followed by the Federal courts held within such State.<sup>23</sup> The statute law of a State will always be followed by a Federal court there held, so far as the statutes establish a local rule of property;<sup>24</sup> and nearly always, so far as they create or abolish rights as distinct from remedies.<sup>25</sup> The construction of a statute by the courts of the State which enacted it will be followed by the Federal courts provided such construction is clear, and was made before the facts occurred out of which the question for adjudication arose;<sup>26</sup> and if, pending a writ of error or appeal, the

<sup>22</sup> *Hartford F. Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U. S. 91, 100, per Gray, J., holding that the validity of an agreement that the lessor, a railway company, should not be responsible to the lessee for damage by fire due to the lessor's negligence, should be determined in accordance with the decisions of the courts of the State. The State decisions as to the validity of a stipulation in a mortgage for an attorney's fee are followed by the Federal courts. *Bendey v. Townsend*, 109 U. S. 665; *Dodge v. Tulleys*, 144 U. S. 451; *Gray v. Havemeyer (C. C. A.)*, 58 Fed. R. 174.

<sup>23</sup> *Neves v. Scott*, 13 How. 268, 271; *Gaines v. Fuentes*, 92 U. S. 10, 20; *Ellis v. Davis*, 109 U. S. 485; *Lorman v. Clarke*, 2 McLean, 568; *McClaskey v. Barr*, 42 Fed. R. 609, 617. See *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Nichols v. Eaton*, 91 U. S. 716, 729.

<sup>24</sup> *D'Wolf v. Rabaud*, 1 Pet. 476; *Clark v. Smith*, 13 Pet. 195; *Fitch v.*

*Creighton*, 24 How. 159; *Brine v. Insurance Co.*, 96 U. S. 627; *Mills v. Scott*, 99 U. S. 25; *Van Norden v. Morton*, 99 U. S. 378; *Cummings v. National Bank*, 101 U. S. 153, 157; *Holland v. Challen*, 110 U. S. 15; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405.

<sup>25</sup> *Bucher v. Cheshire R. Co.*, 125 U. S. 555. But see *Watson v. Tarpley*, 18 How. 517; *supra*, §§ 6, 7.

<sup>26</sup> *Bell v. Morrison*, 1 Pet. 851; *D'Wolf v. Rabaud*, 1 Pet. 476; *Van Rensselaer v. Kearney*, 11 How. 297; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137; *Townsend v. Todd*, 91 U. S. 452; *U. S. v. Fox*, 94 U. S. 315; *Scipio v. Wright*, 101 U. S. 665; *Burgess v. Seligman*, 107 U. S. 20, 84; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Bacon v. N. W. Mut. L. Ins. Co.*, 131 U. S. 258; *Hawkins v. Glenn*, 131 U. S. 319, 331; *Barnum v. Okolona*, 148 U. S. 393, 397; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194. So held of the decisions of a special com-

highest court of the State gives to the statute a different interpretation from that which seemed to prevail when the court below made its decision, the judgment or decree will ordinarily be reversed.<sup>27</sup> If a contract when made is valid by the laws of the State as then construed by its courts, subsequent decisions altering the construction of those laws will not be followed by the Federal courts.<sup>28</sup> This rule does not extend so as to authorize the reversal of a judgment of a State court because it gave a construction to a State statute different from one previously given by it to the same language in another statute.<sup>29</sup> Whether a State statute has been passed<sup>30</sup> or repealed<sup>31</sup> by the legislature, and whether a particular corporation is a corporation of that State,<sup>32</sup> are questions as to which the Federal courts will in general follow the decisions of the courts of such State. Federal courts will in actions at common law on causes of action not created by Federal statutes follow the Statutes of Limitations,<sup>33</sup> even when they are applied to judgments of the

mission. *Ankeny v. Hannon*, 147 U. S. 118. So held of a divided court. *Williams v. Eggleston*, 170 U. S. 304. But see *Central R. Co. v. Wright*, 164 U. S. 327. The decisions of State courts as to the interpretation of a Territorial statute in force in such State are binding on the Federal courts. *Ankeny v. Clark*, 148 U. S. 345.

<sup>27</sup> *Tefft v. Stern* (C. C. A.), 74 Fed. R. 755; *Bauserman v. Blunt*, 147 U. S. 647. But see *Morgan v. Curtenius*, 20 How. 1; *Burgess v. Seligman*, 107 U. S. 20.

<sup>28</sup> *Ohio L. Ins. & Tr. Co. v. Debolt*, 16 How. 416; *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 Wall. 294; *Thomson v. Lee County*, 3 Wall. 327; *Douglass v. Pike County*, 101 U. S. 677; *Louisiana v. Pilsbury*, 105 U. S. 278; *Carroll County v. Smith*, 111 U. S. 556; *Anderson v. Santa Anna*, 116 U. S. 856. See *N. O. W. W. Co. v. Southern B. Co.*, 36 Fed. R. 833. Where the former decisions of the State courts were against the validity of the contract and the lat-

ter sustain it, the latter are followed. *Wade v. Travis County*, 174 U. S. 499, 509.

<sup>29</sup> *Wood v. Brady*, 150 U. S. 18.

<sup>30</sup> *Leavenworth County v. Barnes*, 94 U. S. 70; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Supervisors*, 105 U. S. 667; *Re Duncan*, 139 U. S. 449; *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 Fed. R. 812.

<sup>31</sup> *Kibbe v. Ditto*, 93 U. S. 674; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Southern Ry. Co. v. N. C. Corp. Commission*, 99 Fed. R. 162.

<sup>32</sup> *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409; *Fitzgerald v. No. Pac. R. Co.*, 45 Fed. R. 812. For a dictum that the construction by State courts of a reservation of a right to amend corporate charters should be followed by the Federal courts, see *People ex rel. Schurz v. Cook*, 148 U. S. 397, 411.

<sup>33</sup> *Bell v. Morrison*, 1 Pet. 351; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137; *Bauserman v. Blunt*, 147 U. S. 647; *supra*, § 8.

courts of the United States,<sup>34</sup> Statutes of Frauds,<sup>35</sup> recording acts,<sup>36</sup> statutes regulating chattel mortgages,<sup>37</sup> insolvents' assignments,<sup>38</sup> so far as they are not affected by the bankruptcy law, employers' liability,<sup>39</sup> the measure of damages,<sup>40</sup> the granting compensation for improvements made upon land in good faith,<sup>41</sup> regulating the sale of land within their jurisdiction by domestic and foreign corporations;<sup>42</sup> making shares of stock in a domestic corporation personal property within the State,<sup>43</sup> statutes giving a cause of action for an injury that has caused a death,<sup>44</sup> and, in so far as they affect rights, the Sunday laws<sup>45</sup> of the State where such courts are held; and the construction given to those statutes by the courts of the State which enacted them, so far as they apply, subject to the exceptions already noted. The Federal courts will follow the decisions of the State courts as to the allowance or disallowance of interest on overdue coupons for interest;<sup>46</sup> or upon damages for

<sup>34</sup> *Metcalf v. Watertown*, 153 U. S. 671.

<sup>35</sup> *D'Wolf v. Rabaud*, 1 Pet. 476; *Moses v. Lawrence County Bank*, 149 U. S. 298, 303.

<sup>36</sup> *Townsend v. Todd*, 91 U. S. 452; *Jones v. Smith*, 40 Fed. R. 314; *Union Pac. Ry. Co. v. Reed*, 80 Fed. R. 234.

<sup>37</sup> *Etheridge v. Sperry*, 139 U. S. 266, 277; *Wilson v. Perrin* (C. C. A.), 62 Fed. R. 629.

<sup>38</sup> *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223; *Smith M. P. Co. v. McGroarty*, 136 U. S. 237; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457. So of State statutes giving preferences to claims against the estates of decedents which are presented within a certain time, *Dodd v. Ghiselin*, 27 Fed. R. 405; and providing that upon the foreclosure of a mortgage given to secure the payment of several notes, the notes shall be paid in the order in which they fall due. *N. Y. Security & Tr. Co. v. Lombard*, 65 Fed. R. 271; reversed upon another point (C. C. A.), 74 Fed. R. 769.

<sup>39</sup> *Peirce v. Van Dusen* (C. C. A.), 78 Fed. R. 693.

<sup>40</sup> *Golden Reward Min. Co. v. Buxton Min. Co.* (C. C. A.), 97 Fed. R. 413.

<sup>41</sup> *McClaskey v. Barr*, 62 Fed. R. 209. Cf. *Santee R. C. L. Co. v. James*, 50 Fed. R. 360.

<sup>42</sup> *Williams v. Gaylord* (C. C. A.), 102 Fed. R. 372. But not State statutes forbidding the enforcement of contracts by foreign corporations which have not complied with certain conditions. *Sullivan v. Beck*, 79 Fed. R. 200; *Eastern B. & L. Ass'n v. Bedford*, 88 Fed. R. 7.

<sup>43</sup> *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 13.

<sup>44</sup> *Railroad Co. v. Barron*, 5 Wall. 90; *Serensen v. N. P. R. Co.*, 45 Fed. R. 407; *Holland v. Brown*, 35 Fed. R. 43; *Holmes v. Railway Co.*, 5 Fed. R. 75; s. c., 5 Fed. R. 523; *Maysville St. R. & T. Co. v. Marvin* (C. C. A.), 59 Fed. R. 91; *Dennick v. Central R. Co.*, 103 U. S. 11.

<sup>45</sup> *Bucher v. Cheshire R. Co.*, 125 U. S. 555.

<sup>46</sup> *Bolles v. Town of Amboy*, 40 Fed. R. 168; *Holden v. Freedman's S. & Tr. Co.*, 100 U. S. 72.



a tort;<sup>47</sup> and as to the rate of interest upon an obligation after it is due.<sup>48</sup> Ordinarily they will also follow the State decisions as to the liability of municipal corporations for torts,<sup>49</sup> and their power to contract.<sup>50</sup> The right to issue a writ of *scire facias* under section 955 of the Revised Statutes, where the cause of action is not created by an act of Congress, is barred by the lapse of time prescribed by the State Statute of Limitations.<sup>51</sup> The title to land formed by accretion,<sup>52</sup> the rights of riparian owners in the bed of a stream, whether navigable or otherwise,<sup>53</sup> the validity of tax sales,<sup>54</sup> and generally all questions affecting real estate,<sup>55</sup> in the absence of constitutional difficulties, depend upon the local rule of property. The authorities as to how far the State law of *lis pendens* will be followed are not harmonious.<sup>56</sup> A State statute giving the right to two trials in an action of ejectment will be followed by the Federal

<sup>47</sup> N. Y., L. E. & W. R. Co. v. Estill, 147 U. S. 591.

<sup>48</sup> Ohio v. Frank, 103 U. S. 697.

<sup>49</sup> Detroit v. Osborne, 135 U. S. 492; Edgerton v. Mayor, etc. of N. Y., 27 Fed. R. 80. A municipal fire-boat was held liable in admiralty in a case where the State law gave no remedy against the city. Workman v. New York, 179 U. S. 552.

<sup>50</sup> Claiborne County v. Burks, 111 U. S. 400; Norton v. Shelby County, 118 U. S. 425, 440; Meriwether v. Muhlenburg Court, 120 U. S. 354, 357; Francis v. Howard County, 50 Fed. R. 44; Thompson v. Searcy County, 57 Fed. R. 1030. But see *supra*, note 28.

<sup>51</sup> Browne v. Chavez, 181 U. S. 68; Butler v. Poole, 44 Fed. R. 586; Barkler v. Ladd, 3 Saw. 44; Price v. Fates, 19 A. L. J. 295; *supra*, § 373.

<sup>52</sup> Barney v. Keokuk, 94 U. S. 324; St. Louis v. Rutz, 138 U. S. 226, 250.

<sup>53</sup> Barney v. Keokuk, 94 U. S. 324, 338; St. Louis v. Myers, 118 U. S. 566; Packer v. Bird, 137 U. S. 661; St. Louis v. Rutz, 138 U. S. 226, 242.

<sup>54</sup> Lewis v. Monson, 151 U. S. 454; Bardon v. Land & R. Imp. Co., 157 U. S. 327.

<sup>55</sup> Case v. Kelly, 133 U. S. 21. For example, as to what constitutes pos-

session of land, Santee R. C. L. Co. v. James, 50 Fed. R. 360. As to the rights of abutters in streets, Lobensteine v. Union El. R. Co., 80 Fed. R. 199. But see Barber v. Pittsburgh, etc. Ry. Co., 69 Fed. R. 501.

<sup>56</sup> The Federal courts will refuse to follow any State statutes or decisions which provide that non-resident citizens of other States who hold negotiable paper or chattels beyond the jurisdiction of the court shall have constructive notice of litigation affecting the title or validity of the same. Enfield v. Jordan, 119 U. S. 680, 693. A *bona fide* holder of negotiable paper is not subject to the general doctrine of *lis pendens*. Farmers' L. & Tr. Co. v. Toledo & S. H. R. Co., 54 Fed. R. 759, 772, per Jackson, J. It has been held in the Second Circuit, that a State statute providing that purchasers without actual notice of a pending suit are not bound by the proceedings therein unless a notice of *lis pendens* has been filed in a designated public office, will be followed by the Federal court there held, which will require notice of the pendency of a suit in such a Federal court to be filed in such office so as to bind subsequent purchasers.



courts there held.<sup>57</sup> The courts of the United States in the administration of the criminal law are governed by the rules of the common law.<sup>58</sup>

§ 376. *New trials.*—The power of a Federal court to grant a new trial cannot be enlarged or restricted by a State statute.<sup>1</sup> It has been held that a State statute forbidding a new trial for the insufficiency of damages would be unconstitutional as a violation of the Seventh Amendment if applied to a Federal court,<sup>2</sup> but that the right to two or more trials of an action for ejectment may be given<sup>3</sup> or taken away<sup>4</sup> by a State statute, which is constitutional even when applied to actions pending

*Jones v. Smith*, 40 Fed. R. 814, per Laurence, J. *Contra* in the Sixth Circuit. *McCloskey v. Barr*, 48 Fed. R. 130, 132, per Jackson and Sage, JJ.

<sup>57</sup> *Equator M. & S. Co. v. Hall*, 106 U. S. 86. But see § 376. "Statutory modifications of the common law in regard to the rights of husband and wife, as plaintiffs, in actions at law in the courts of a State, are applicable also in the United States courts held in such State, if not inconsistent with the laws of the United States or with the duties which belong to its judges and courts and the powers with which they are clothed." *The Morning Journal Ass'n v. Smith* (C. C. A.), 56 Fed. R. 141, per curiam; *Texas & Pac. Ry. Co. v. Humble*, 181 U. S. 57. A State statute providing that an assignee of a cause of action by a written instrument may sue in his own name, although the assignor retains an interest therein, will be followed by a Federal court in an action at common law. *Dexter, Horton & Co. v. Sayward*, 51 Fed. R. 729, 732. See *supra*, § 360. Judge Betts said at circuit that the adjudications of the State courts "prescribing the laws of its citizens in respect to the custody of infant children resident in the State, and the relative rights of parents in respect to such children, are rules of decision in this court in

al common-law cases touching these questions." *In re Barry*, 42 Fed. R. 118, 132; s. c., 136 U. S. 597, 624. Where the Federal court had adopted the State practice in serving process, it was held that the State decisions, holding that the sheriff's return was conclusive, must be followed. *Joseph v. New Albany St. & R. M. Co.*, 53 Fed. R. 180. The State law as to common-law set-off was followed. *Charnley v. Sibley* (C. C. A.), 78 Fed. R. 980; *Fricks v. Clements*, 81 Fed. R. 542. A Federal court refused to follow a State statute giving an attorney a lien on his client's cause of action so far as it was construed to require the court to go on and try a cause for the attorney's benefit after it had been settled by the parties, in ignorance of his claim. *Sherry v. Oceanic S. Nav. Co.*, 72 Fed. R. 565.

<sup>58</sup> *Howard v. U. S.* (C. C. A.), 75 Fed. R. 986.

§ 376. <sup>1</sup> *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Newcomb v. Wood*, 97 U. S. 581; *Fishbrom v. Chicago, M. & St. P. Ry. Co.*, 137 U. S. 60.

<sup>2</sup> *Hughey v. Sullivan*, 80 Fed. R. 72.

<sup>3</sup> *Equator Co. v. Hall*, 106 U. S. 86. As to costs, see *Shreve v. Cheesman* (C. C. A.), 69 Fed. R. 785.

<sup>4</sup> *Campbell v. Iron-Silver Min. Co.* (C. C. A.), 83 Fed. R. 643.

when it was passed,<sup>5</sup> and will be followed by the courts of the United States.<sup>6</sup>

The Federal courts have power to grant new trials after a trial by jury "for reasons for which new trials have usually been granted in the courts of law."<sup>7</sup> A motion for a new trial must be made or noticed for argument during the term at which the trial took place, or by special leave of the court granted, upon a petition filed within forty-two days after the entry of judgment.<sup>8</sup> A motion for a new trial upon exceptions, or because the verdict was against the evidence or against the weight of evidence, or because of excessive or insufficient damages, is regularly argued before the judge who tried the case.<sup>9</sup> He may, if he chooses, ask another judge to assist him in rendering his decision;<sup>10</sup> and the latter may then hear the argument;<sup>11</sup> but neither party has the right to demand the participation of another judge in the decision.<sup>12</sup> It has been held that the power to try a case carries with it as an incident the power to hear and decide a motion for a new trial,<sup>13</sup> but that an order denying a motion for a new trial is void if signed by a judge after his successor has been appointed and qualified, and notice of this has been given to the judge who signs the order.<sup>14</sup> The power of Congress to authorize such a re-examination of the proceedings upon the trial has been questioned.<sup>15</sup> As a general rule, on a motion for a new trial affidavits of jurors may be received to support but not to impeach the verdict.<sup>16</sup> "A juryman may

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.; *Equator Co. v. Hall*, 106 U. S. 86. After one trial and an order for a new trial in a State court, it was held that the plaintiff could not discontinue and sue in the Federal court. *Hyatt v. Challiss*, 55 Fed. R. 267.

<sup>7</sup> U. S. R. S., § 726; *Clark v. Sohler*, 1 W. & M. 368; *Milliken v. Ross*, 9 Fed. R. 855.

<sup>8</sup> U. S. R. S., § 987. See § 380.

<sup>9</sup> *Ives v. Grand Trunk Ry. Co.*, 35 Fed. R. 176.

<sup>10</sup> *Ives v. Grand Trunk Ry. Co.*, 35 Fed. R. 176; *Adams v. Spangler*, 17 Fed. R. 133.

<sup>11</sup> *Adams v. Spangler*, 17 Fed. R.

183; *Ives v. Grand Trunk Ry. Co.*, 35 Fed. R. 176.

<sup>12</sup> *Ives v. Grand Trunk Ry. Co.*, 35 Fed. R. 176.

<sup>13</sup> *Cheesman v. Hart*, 43 Fed. R. 98, 105.

<sup>14</sup> *U. S. v. Alexander*, 46 Fed. R. 728.

<sup>15</sup> *Ives v. Grand Trunk Ry. Co.*, 35 Fed. R. 176. *Cf.* *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 573.

<sup>16</sup> *Hyman v. Eames*, 41 Fed. R. 676, 677; *Chandler v. Thompson*, 30 Fed. R. 38, 45; *Glaspell v. N. Pac. R. Co.*, 43 Fed. R. 903, 909; *Fuller v. Fletcher*, 44 Fed. R. 34, 39; *Biggs v. Barry*, 2 Curtis, 259; *Ewer's Adm'r v. National Imp. Co.*, 63 Fed. R. 562.

testify as to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."<sup>17</sup> It has been held: that affidavits of jurors stating that a certain paper was not shown to nor read by them,<sup>18</sup> and that reading a newspaper report did not influence their verdict,<sup>19</sup> may be admitted to support a verdict; that affidavits of jurors stating that they were not influenced by erroneous instructions as to the measure of damages will not be considered;<sup>20</sup> that affidavits of jurors explaining the grounds of their verdict will not be considered;<sup>21</sup> that affidavits of jurors showing statements by a juror in the jury room as to his incompetency,<sup>22</sup> and showing the presence of an officer and his statements and the reading of a newspaper report and comments on the case during the deliberations of the jury<sup>23</sup> may be admitted to impeach the verdict. A motion for a new trial may be denied upon condition that the plaintiff remit a portion of the verdict.<sup>24</sup> In one case, when the jury were sent out, the court said that no provision was made by law for furnishing them meals, and asked whether both parties would contribute to the expense of any food that might be needed by the jury during their deliberations; whereupon the defendant's counsel declined to pay any part of such expense, and the meals of the jury were provided at the plaintiff's expense; it was held that this was a ground for a new trial after a verdict for the plaintiff.<sup>25</sup> A new trial was granted because pending the trial three jurymen visited the plaintiff's place of business and were there given twenty-five cigars;<sup>26</sup> because a juror privately

<sup>17</sup> Mr. Justice Gray in *Woodward v. Leavitt*, 107 Mass. 453; approved in *Clyde Mattox v. U. S.*, 146 U. S. 140, 149.

<sup>18</sup> *Fuller v. Fletcher*, 44 Fed. R. 84, 89.

<sup>19</sup> *U. S. v. Reid*, 12 How. 361, 366.

<sup>20</sup> *Glaspell v. N. Pac. R. Co.*, 43 Fed. R. 903, 909.

<sup>21</sup> *Chandler v. Thompson*, 80 Fed. R. 38, 45. Affidavits of jurors to show that a verdict was a quotient verdict were not considered; and it was held that in the absence of an antecedent agreement to be bound

by a division of the sum of each juror's estimate of the damages, a verdict thus obtained should not be set aside. *Consol. Ice Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. R. 898.

<sup>22</sup> *Hyman v. Eames*, 41 Fed. R. 676, 677.

<sup>23</sup> *Clyde Mattox v. U. S.*, 146 U. S. 140.

<sup>24</sup> *Chils v. Gronlund*, 41 Fed. R. 145; s. c., 41 Fed. R. 505.

<sup>25</sup> *Johnson v. Hobart*, 45 Fed. R. 542.

<sup>26</sup> *Platt v. Threadgill*, 80 Fed. R. 192.

measured a place described in the testimony;<sup>27</sup> and because of articles upon the issues published in newspapers which were read by the jurors.<sup>28</sup> As a general rule when the evidence is conflicting a new trial will not be ordered, although the court thinks that the jury should have brought in a different verdict.<sup>29</sup> "Non-residence of a juror is not of itself a sufficient reason to compel the grant of a new trial. It is a question of sound discretion whether, under all the facts connected with the case, it should be done."<sup>30</sup> An order granting or denying a motion for a new trial cannot be reviewed upon a writ of error;<sup>31</sup> but a refusal to consider affidavits offered in support of a motion for a new trial may be a ground for a reversal when an exception was duly taken to their exclusion.<sup>32</sup>

§ 377. Bills of exceptions.—The time and manner of taking exceptions and filing bills of exceptions are also matters as to which the Federal courts act independently of the State practice.<sup>1</sup> The Revised Statutes provide that "a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon

<sup>27</sup> *Ewer's Adm'r v. National Imp. Co.*, 63 Fed. R. 562.

<sup>28</sup> *Meyer v. Cadwalader*, 49 Fed. R. 82; *Morse v. Montana Ore P. Co.*, 105 Fed. R. 837.

<sup>29</sup> *Plummer v. Granite Mountain Min. Co.*, 55 Fed. R. 755, 756.

<sup>30</sup> *Fisher v. Yoder*, 53 Fed. R. 565, per Buffington, J.

<sup>31</sup> *Missouri Pac. Ry. Co. v. Chicago*

& A. R. Co., 132 U. S. 191; *Beaupré v. Noyes*, 138 U. S. 397; *infra*, § 494, notes 87, 88, 89.

<sup>32</sup> *Clyde Mattox v. U. S.*, 146 U. S. 140, 147.

§ 377. <sup>1</sup> *Chateaugay Ore & Iron Co.*, 128 U. S. 544; *Fishburn v. Chicago, M. & St. P. Ry. Co.*, 137 U. S. 60; *Richmond & D. R. Co. v. McGee (C. C. A.)*, 50 Fed. R. 906.

said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case such judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."<sup>2</sup>

If the bill of exceptions is neither signed nor sealed, it will be disregarded upon a writ of error.<sup>3</sup> An exception must be noted when taken,<sup>4</sup> but, in the absence of a rule or order restricting or enlarging the time, may be signed at any time during the term.<sup>5</sup> A bill of exceptions must be signed at the term at which the judgment was rendered, not necessarily at the term at which the trial was had.<sup>6</sup> A bill of exceptions filed subsequently to the term at which judgment is entered will be disregarded by the court of review,<sup>7</sup> even although an order of the trial court has permitted it to be filed *nunc pro tunc*,<sup>8</sup> unless before the time expired it was enlarged by order or consent,<sup>9</sup> except in districts where a special local rule or

<sup>2</sup> U. S. R. S., § 953, as amended by 31 St. at L. 270. Before this amendment the only remedy was a new trial where the death or illness of the trial judge prevented his signing the bill of exceptions. *Hume v. Bowie*, 148 U. S. 245, 253.

<sup>3</sup> *Mussina v. Cavazos*, 6 Wall. 855, 863; *Origet v. U. S.*, 125 U. S. 240.

<sup>4</sup> *Hunnicutt v. Peyton*, 102 U. S. 833, 854. Although the bill of exceptions states that exceptions to a charge were taken when it was given, they are bad when the bill discloses that they were not taken till afterwards. *MacDonald v. U. S.*, 63 Fed. R. 426.

<sup>5</sup> *Hunnicutt v. Peyton*, 102 U. S. 833, 854.

<sup>6</sup> *Walton v. U. S.*, 9 Wheat. 651; *Muller v. Ehlers*, 91 U. S. 249; *Preble v. Bates*, 40 Fed. R. 745.

<sup>7</sup> *Morse v. Anderson*, 150 U. S. 156; *Miller v. Morgan* (C. C. A.), 67 Fed. R. 82.

<sup>8</sup> *Muller v. Ehlers*, 91 U. S. 249; *Whalen v. Sheridan*, 10 Fed. R. 661; *Herbert v. Butler*, 14 Blatchf. 857. But see *Harrison v. German American F. Ins. Co.* (C. C. A.), 90 Fed. R. 758; *So. Pac. Co. v. Hamilton* (C. C. A.), 54 Fed. R. 468, 474.

<sup>9</sup> *Davis v. Patrick*, 122 U. S. 138; *Chateaugay Ore & Iron Co.*, 128 U. S. 544; *Richmond & D. R. Co. v. McGee* (C. C. A.), 50 Fed. R. 906; *Yellow P. L. Co. v. Chapman* (C. C. A.), 74 Fed. R. 444; *U. S. v. Jones*, 149 U. S. 262; *Ward v. Cochran*, 150 U. S. 597. An indorsement on a bill of exceptions, "We agree upon the above and foregoing bill of exceptions," signed by counsel during an extension of time granted by an *ex parte* vacation

practice prevails.<sup>10</sup> A bill of exceptions if otherwise in time may be signed after a writ of error has been sued out.<sup>11</sup> If the time prescribed by the rules is enlarged by order, it is the safer practice to date the bill of exceptions at a day within the time as originally limited, and to insert in the order a provision that the bill of exceptions be signed, sealed, and filed, *nunc pro tunc*.<sup>12</sup> It has been held that, even after a writ of error, a bill of exceptions duly allowed may be amended by the trial court,<sup>13</sup> but not by the court of review,<sup>14</sup> and that a new exception cannot be added by amendment after the time to file a bill has expired.<sup>15</sup> Exceptions contained in the minutes of the trial included in the transcript but not signed by the judge will not be considered by the appellate court.<sup>16</sup> A bill of exceptions which states that the parties respectively introduced evidence as shown in an exhibit annexed and marked A., which exhibit consists of the stenographer's report of the trial, containing oral exceptions then taken, is not a good bill of exceptions, and may be disregarded by the appellate court.<sup>17</sup> A paper in the record, entitled "case and exceptions," is a sufficient bill of

order, is a waiver of objections to the order of enlargement of the time. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 64 Fed. R. 79. An order extending the time for the preparation and filing of the transcript does not extend the time for signing and filing the bill of exceptions. *Reliable L. & B. Co. v. Stahl* (C. C. A.), 102 Fed. R. 590. The bill itself should show any excuse for the delay. *Ibid.* An extension granted during the vacation before the term succeeding the judgment was held to be insufficient. *M., K. & T. Ry. Co. v. Russell*, 60 Fed. R. 501.

<sup>10</sup> *Chateaugay Ore & Iron Co.*, 128 U. S. 544; *Woods v. Lindvall*, 48 Fed. R. 73; *Morse v. Anderson*, 150 U. S. 156. For the practice in the First Circuit, see *N. Y. & N. E. R. Co. v. Hyde* (C. C. A.), 56 Fed. R. 188. It has been held in the Seventh Circuit that the pendency of a motion for a new trial or to set aside the judgment extends the time to have the bill of exceptions signed and filed,

and that the court when denying the motion may extend the time even at a subsequent term. *Tullis v. L. E. & W. R. Co.* (C. C. A.), 105 Fed. R. 554.

<sup>11</sup> *Hunnicutt v. Peyton*, 102 U. S. 383, 357; *Davis v. Patrick*, 122 U. S. 188.

<sup>12</sup> *Hunnicutt v. Peyton*, 102 U. S. 383, 357; *Walton v. U. S.*, 9 Wheat. 651.

<sup>13</sup> *Whiting v. Equitable L. A. Soc.*, 60 Fed. R. 197.

<sup>14</sup> *Stimpson v. Westchester R. Co.*, 8 How. 553; *Case v. Hall* (C. C. A.), 94 Fed. R. 800.

<sup>15</sup> *Sutherland v. Round* (C. C. A.), 57 Fed. R. 467.

<sup>16</sup> *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 598; *Thompson v. Riggs*, 5 Wall. 633; *Young v. Martin*, 8 Wall. 354; *Insurance Co. v. Lanier*, 95 U. S. 171; *Hanna v. Maas*, 122 U. S. 24, 26.

<sup>17</sup> *Hanna v. Maas*, 122 U. S. 24. See *Marion Phosphate Co. v. Cummer* (C. C. A.), 60 Fed. R. 878.



exceptions, if it has all the requisites of a bill, except the name.<sup>18</sup> Theoretically, exhibits marked upon the trial are left with the clerk, although in practice they are usually returned to and kept by the party who offers them.<sup>19</sup> It has been held that they are a part of the record and must be included in the transcript by the clerk.<sup>20</sup> But the Supreme Court has held that when a paper, which is to constitute a part of the bill of exceptions, is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions; otherwise it may be disregarded.<sup>21</sup> The court refused to consider an affidavit in support of a motion for a continuance,<sup>22</sup> and affidavits in support of a motion for a new trial,<sup>23</sup> which were included in the transcript but not referred to in the bill of exceptions.<sup>24</sup>

The bill of exceptions should not contain the evidence in the language used by the witnesses, but it must contain enough of the evidence to show the materiality of the exceptions.<sup>25</sup> And where separate bills were signed, it was held that the court could not consider evidence stated in one of them when deciding an exception taken in another bill upon the same writ of error.<sup>26</sup> It is the safer practice to include in the bill of exceptions a statement that it contains all the evidence affecting the matter to which the exceptions relate.<sup>27</sup> Otherwise, the court of review will not presume that it contains all the evidence and may, on that account, decline to review a refusal to direct a verdict.<sup>28</sup> Where the bill of exceptions states that a party "gave evidence tending to show" certain facts, it was

<sup>18</sup> *Herbert v. Butler*, 97 Fed. R. 819.

<sup>19</sup> *Hobbs v. Nat. Bank of Commerce* (C. C. A.), 93 Fed. R. 615.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Leftwitch v. Lecanu*, 4 Wall. 187.

<sup>22</sup> *Evans v. Stettinisch*, 149 U. S. 605.

<sup>23</sup> *Stewart v. Wyoming C. R. Co.*, 128 U. S. 333.

<sup>24</sup> *Hickman v. Jones*, 9 Wall. 197. See *Marion Phosphate Co. v. Cummer* (C. C. A.), 60 Fed. R. 873.

<sup>25</sup> *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 606; *Atchison, T. & S. F. R.*

*Co. v. Myers* (C. C. A.), 63 Fed. R. 793;

*U. S. v. Wingate*, 44 Fed. R. 129, 141; *Worthington v. Mason*, 101 U. S. 149.

<sup>26</sup> *S. W. Va. Imp. Co. v. Frari* (C. C. A.), 58 Fed. R. 171.

<sup>27</sup> *Ibid.*; *Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 606; *U. S. v. Wingate*, 44 Fed. R. 129; *U. S. v. Norris*, 44 Fed. R. 740; *Kingory v. U. S.*, 44 Fed. R. 669.

<sup>28</sup> *Atchison, T. & S. F. R. Co. v. Myers* (C. C. A.), 63 Fed. R. 793.



held that the court could not review the question whether the evidence was sufficient to warrant the verdict.<sup>29</sup> Where it is claimed that the jury refused to follow an instruction of the court, the bill of exceptions must show affirmatively that they did so.<sup>30</sup>

In the absence of a statement to that effect, a bill of exceptions is presumed not to contain all the evidence.<sup>31</sup> If the bill of exceptions shows that an offer of evidence was made and refused admission, and there is nothing in the record to indicate bad faith, the appellate court must assume that the proof could have been made, and govern itself accordingly.<sup>32</sup> The rules of the Supreme Court provide that "the judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and these matters of law, and these only, shall be inserted in the bill of exceptions, and allowed by the court."<sup>33</sup> A general exception to the whole charge,<sup>34</sup> or to the whole charge "and to each and every part thereof,"<sup>35</sup> is of no effect where the charge contains distinct propositions, and any one of them is free from objection. So is an exception to "a theory announced throughout" a charge, or throughout an instruction in the same.<sup>36</sup> An exception to the refusal of the court to instruct the jury in language prayed for by counsel is of no avail, if the refusal be followed by instructions in the general charge in different language, but substantially to the same effect.<sup>37</sup> An exception to a charge or to a refusal to charge is of no avail unless the bill of exceptions

<sup>29</sup> *Union Pac. Ry. Co. v. Harris* (C. C. A.), 63 Fed. R. 800.

<sup>30</sup> *Harper & Reynolds Co. v. Wilgus* (C. C. A.), 56 Fed. R. 587.

<sup>31</sup> *Atchison, T. & S. F. R. Co. v. Myers* (C. C. A.), 63 Fed. R. 793.

<sup>32</sup> *Scotland County v. Hill*, 112 U. S. 183, 186.

<sup>33</sup> S. C. Rule 4; C. C. of A. Rule 10.

<sup>34</sup> *Anthony v. Louisville & N. R. Co.*, 132 U. S. 172; *Lincoln v. Clafin*,

7 Wall. 132, 139; *Cooper v. Schlesinger*, 111 U. S. 148, 151; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 596; *Burton v. West Jersey F. Co.*, 114 U. S. 474, 476.

<sup>35</sup> *Price v. Parkhurst* (C. C. A.), 53 Fed. R. 312.

<sup>36</sup> *Bogk v. Gasser*, 149 U. S. 17, 26.

<sup>37</sup> *Anthony v. Louisville & N. R. Co.*, 132 U. S. 172.

shows that it was taken before the jury retired.<sup>38</sup> It is too late to take it subsequently, even although it is given in the counsel's absence at the jury's request for further instructions.<sup>39</sup> A statement that the party who requested the instruction "then and there excepted," is sufficient.<sup>40</sup> The material facts or proofs on which the charges to which exceptions were taken rest,<sup>41</sup> and enough of the evidence to show that they were erroneous,<sup>42</sup> should be inserted before the charge, in order that the court may see if the points arose on which they were given and to which exception was taken. The part of the charge to which the exception was taken must be inserted in full,<sup>43</sup> with enough of the rest to show that it was not qualified.<sup>44</sup> In a civil case, the omission of the court to charge on a material question of law is not the subject of an exception when no request for such charge was made on the trial.<sup>45</sup>

A judge is not required to charge the law on hypothetical questions which do not affect the case on trial.<sup>46</sup> If the party asking the charge is dissatisfied with the court's refusal, he may except thereto, which exception will avail him if he shows that the request was warranted by the testimony, and that the charge he asked ought to have been given.<sup>47</sup> If the judge proceeds to state the law, and states it erroneously, an exception will lie to his ruling, and if it could have had any influence on the jury, the verdict will be set aside.<sup>48</sup> An exception to the remarks of counsel should be taken when they are made.<sup>49</sup> Where a party, after an exception, instead of standing upon it, by an amendment or otherwise withdraws from the position

<sup>38</sup> *Phelps v. Mayer*, 15 How. 160; 149; *U. S. v. Wingate*, 44 Fed. R. 129, Pacific Express Co. v. Malin, 132 U. S. 181.

<sup>39</sup> *Stewart v. Wyoming C. R. Co.*, 128 U. S. 383.

<sup>40</sup> *Kellogg v. Forsyth*, 2 Black, 571. It has been held that the statement "to which defendant excepted," when following a ruling in what purports to be a narrative report of the trial, is sufficient. *New Orleans & N. E. Ry. Co. v. Jopes*, 142 U. S. 18.

<sup>41</sup> *U. S. v. Morgan*, 11 How. Pr. 154, 158.

<sup>42</sup> *Worthington v. Mason*, 101 U. S.

<sup>43</sup> *Stimpson v. West Chester R. Co.*, 8 How. 553.

<sup>44</sup> *Hicks v. U. S.*, 150 U. S. 443, 453.

<sup>45</sup> *Texas & P. Ry. Co. v. Volk*, 151 U. S. 73.

<sup>46</sup> *Etting v. Bank of U. S.*, 11 Wheat. 59.

<sup>47</sup> *Etting v. Bank of U. S.*, 11 Wheat. 59, 75. Cf. *Hudson v. Charleston, C. & C. R. Co.*, 55 Fed. R. 252.

<sup>48</sup> *Etting v. Bank of U. S.*, 11 Wheat. 59, 75.

<sup>49</sup> *Chandler v. Thompson*, 30 Fed. R. 38, 45.

that the court held to be erroneous, it may be held that he has waived his right to review the question upon a writ of error.<sup>50</sup> Where a defendant, after an exception to a refusal to direct a verdict in his favor at the end of the plaintiff's case, offers evidence in support of his defense, he waives such prior exception.<sup>51</sup>

The rules of the Circuit Courts usually regulate the manner of settling bills of exceptions. When they are silent, the old English practice is followed.<sup>52</sup> It is the practice in the First and Second Circuits to have but one bill of exceptions containing all the exceptions taken upon the trial.<sup>53</sup> In the Western Circuits several bills of exceptions are often prepared and presented.<sup>54</sup> In the Southern District of New York a special rule regulates the manner and the time within which a bill of exceptions may be settled and signed.<sup>55</sup>

In the Eighth Circuit it is the practice to enter judgment immediately after the verdict; and the motion for a new trial may subsequently be made. In that circuit a bill of exceptions may be allowed and filed at the term at which the motion for a new trial is determined, although that is subsequent to the term at which judgment is entered.<sup>56</sup> Where the record shows that judgment was entered for relief inconsistent with the verdict;<sup>57</sup> or the evidence is all documentary and is annexed to the pleadings or otherwise incorporated in the record;<sup>58</sup> or there is a demurrer to evidence, and the record shows the evidence demurred to,<sup>59</sup> an error thereby appearing may be reviewed without a bill of exceptions. Entries by the clerk of exceptions in the record are disregarded.<sup>60</sup> The bill of excep-

<sup>50</sup> *Campbell v. Haberhill*, 155 U. S. 610, 612.

<sup>51</sup> *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700; *Accident Ins. Co. v. Crandal*, 120 U. S. 527; *Robertson v. Perkins*, 129 U. S. 233; *Columbia & P. R. Co. v. Hawthorn*, 144 U. S. 202.

<sup>52</sup> *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 555; *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 598.

<sup>53</sup> *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 601.

<sup>54</sup> *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 598.

<sup>55</sup> *Chateaugay Ore & Iron Co.*, 128 U. S. 544.

<sup>56</sup> *Woods v. Lindvall*, 48 Fed. R. 73.

<sup>57</sup> *Bennett v. Butterworth*, 11 How. 669; *Hodges v. Easton*, 106 U. S. 408.

<sup>58</sup> *Clinton v. Mo. Pac. Ry. Co.*, 123 U. S. 469, 474; *Moline Plow Co. v. Webb*, 141 U. S. 616, 623.

<sup>59</sup> *Baltimore & P. R. Co. v. Trustees of Sixth Pres. Church*, 91 U. S. 127.

<sup>60</sup> *Young v. Martin*, 8 Wall. 354.

tions is no part of the record,<sup>61</sup> and it cannot be considered when the judgment is attacked collaterally.<sup>62</sup>

§ 378. **Judgments.**—It has been held that in actions for joint torts, judgment may be entered in favor of some and against others, if the jury so find in their verdict,<sup>1</sup> but that separate judgments for different amounts cannot be entered against different defendants<sup>2</sup> except by consent.<sup>3</sup>

Where a plaintiff has recovered a verdict for more than the amount sufficient to warrant a review by writ of error, he may by leave of the court file before judgment a *remittitur* of part of such verdict and enter judgment for an amount less than that required for a review by writ of error.<sup>4</sup> In such a case, no writ of error will issue to the judgment where the jurisdiction of the court of review depends upon the matter in dispute.<sup>5</sup> After judgment a plaintiff cannot, by a release of part of the judgment, deprive his adversary of the right to a writ of error;<sup>6</sup> except by special leave of the court, which may allow him to file a *remittitur nunc pro tunc*, and amend the judgment accordingly, before a writ of error has been allowed.<sup>7</sup> An omission

<sup>61</sup> U. S. v. Taylor, 147 U. S. 695, 700; In re Haskell, 52 Fed. R. 795, 798. As to what constitutes the record, see U. S. v. Taylor, 147 U. S. 695.

<sup>62</sup> In re Haskell, 52 Fed. R. 795, 798.

§ 378. <sup>1</sup>Chaffee & Co. v. U. S., 18 Wall. 516; Sawin v. Kenney, 93 U. S. 289; Sessions v. Johnson, 95 U. S. 347; Insurance Co. v. Boykin, 12 Wall. 433; Chils v. Gronlund, 41 Fed. R. 505.

<sup>2</sup>Chils v. Gronlund, 41 Fed. R. 505.

<sup>3</sup>Insurance Co. v. Boykin, 12 Wall. 433. But see Lovejoy v. Murray, 8 Wall. 1, 11.

<sup>4</sup>Thompson v. Butler, 95 U. S. 694; Alabama Gold L. Ins. Co. v. Nichols, 109 U. S. 232; First Nat. Bank v. Redick, 110 U. S. 224; Pacific Exp. Co. v. Malin, 132 U. S. 531. An entry in the clerk's minutes that the plaintiff consented to the reduction of a verdict is sufficient evidence thereof, and in such a case, after the

reduced amount has been paid and satisfaction of the judgment given, the court will not set aside the transaction on the ground that it had improperly compelled the plaintiff to do so as a condition of a denial of the motion to set the verdict aside as excessive. Lewis v. Wilson, 151 U. S. 551. Where the plaintiff had sued for the benefit of others besides herself, it was held that so much of a *remittitur* filed by her as affected the others' share in the verdict was absolutely void. See Southern Pac. Co. v. Tomlinson, 163 U. S. 369.

<sup>5</sup>Thompson v. Butler, 95 U. S. 694; Alabama Gold L. Ins. Co. v. Nichols, 109 U. S. 232; First Nat. Bank v. Redick, 110 U. S. 224; Pac. Express Co. v. Malin, 132 U. S. 531.

<sup>6</sup>N. Y. El. R. Co. v. Fifth Nat. Bank, 118 U. S. 608.

<sup>7</sup>Pacific Exp. Co. v. Malin, 132 U. S. 531.

of allegations of citizenship essential to the jurisdiction cannot be cured by their insertion in a *remittitur*.<sup>8</sup>

The Federal courts should follow the State practice in recording judgments.<sup>9</sup> The Revised Statutes provide that "judgments and decrees rendered in a Circuit or District Court, within any State, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease by law to be liens thereon."<sup>10</sup> A recent statute provides as follows: "That judgments and decrees rendered in a Circuit or District Court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State; *Provided*, that whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State." "That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public." "Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or the same parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required

<sup>8</sup> Denny v. Pironi, 141 U. S. 121.

<sup>10</sup> U. S. R. S., § 967. See Sellers v.

<sup>9</sup> Morrison v. Bernards Tp., 85 Fed. Corwin, 5 Ohio, 898.  
R. 400; 25 St. at L. 857.

by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish.”<sup>11</sup> The

<sup>11</sup> 25 St. at L. 357, as amended by 28 St. at L. 813.

“The first clause of the act places judgment liens in a Federal court on the same footing in all respects as a judgment lien in a State court of general jurisdiction. But the power of Congress was not adequate to the task of extending the territorial operation of a judgment lien in the mode provided by State laws for a judgment in the State court. Congress was confronted with the difficulty pointed out by Mr. Justice McLean.” (Den v. Jones, 2 McLean, 83, 85).

“The law of a State might provide for filing and docketing a transcript of a judgment of a State court in the clerk’s office of any county in the State, and in this way extend the lien of a judgment beyond the county in which it was rendered. But there was no Federal clerk’s office or other like office, in each county in the State, in which a judgment rendered in a Federal court could be docketed; and Congress could not make it obligatory on the State clerks to docket and enter a judgment of a Federal court on their records. But it was entirely competent for the State to require her clerks to perform this service, and the proviso in section 1 of the act declares, in legal effect, that when the laws of a State provide for docketing in her clerks’ offices, or other offices, the judgments of Federal courts, in the same manner that judgments in her own courts may be docketed, then, and not before, the territorial extent (in other respects they were already the same) of the lien of a judgment in a Federal court in that State shall be the same as that of a judgment in the State court. Where the laws of a

State provide for docketing the judgments of its own courts in any county in the State, but do not make a like provision as to the judgments of the Federal court, the act of Congress is not operative; and in such States the lien of a judgment of a Federal court continues to be co-extensive with its territorial jurisdiction. The law of this State conforms exactly to the requirements of the act of Congress, and makes it operative in this State. The statute reads as follows: ‘Judgments of courts of record of this State, and of courts of the United States rendered within this State, shall be liens on the real estate of the debtor within the county in which the judgment is rendered, from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered. An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the District Court of any county, and such judgment shall be a lien on the real estate of the debtor within that county from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk. Executions shall only be issued from the court in which the judgment is rendered.’ Gen. St. Kan. 1868, ch. 80, § 419.

“Under this statute it is plainly the duty of any clerk of the District Court of the State, when the journal entry of a judgment rendered in a



clerk cannot charge a fee for allowing an individual or a corporation to inspect these indices or records.<sup>12</sup>

A judgment in favor of one or more joint contractors has been held no bar to a suit against another, who was neither served with process nor appeared in the action in which the judgment was rendered.<sup>13</sup>

**§ 379. Correction of judgments by courts that rendered them.**—In the correction, amendment, and vacation of their own judgments, the Federal courts act independently of the law regulating the State courts.<sup>1</sup> “The question relates to the power of the courts and not to the mode of procedure.”<sup>2</sup> At the term at which it is entered, a judgment may, for cause shown, be set aside, modified or amended, by the court where it was entered.<sup>3</sup> After the term has expired, unless a motion for the relief was made or noticed during that term,<sup>4</sup> no alteration or correction can be made except by writ of error, and in that class of cases in which the writ of error *coram nobis* was issued in the old English practice.<sup>5</sup> “The writ of error *coram*

Federal court held in this State is filed in his office, ‘to enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk.’ The words ‘any judgment,’ in the second sentence of the section, obviously, and according to every rule for the construction of statutes, include the judgments specifically mentioned in the first sentence of the section. It may or may not include others, but it undoubtedly includes them. Section 8 of the act of Congress expressly provides that the act shall not be construed to require the filing of a transcript of a judgment of a United States court in the county clerk’s office of the county in which the judgment was rendered, in order that such judgment may be a lien on any property within such county. The result is that a judgment in a United States court in this State is a lien on the lands of the debtor only in the county in which the court was

held and the judgment rendered; but the lien may be extended to any other county, in the mode provided by section 419 of the General Statutes of the State above quoted.” *Dartmouth Sav. Bank v. Bates et al.*, 44 Fed. R. 546, per Caldwell, J. See also *Cooke v. Avery*, 147 U. S. 875.

<sup>12</sup> *In re Chambers*, 44 Fed. R. 786.

<sup>13</sup> *Larison v. Hager*, 44 Fed. R. 49.  
§ 379. <sup>1</sup> *Bronson v. Schulten*, 104 U. S. 410, 417.

<sup>2</sup> *Bronson v. Schulten*, 104 U. S. 410, 417, per Miller, J.; *Ex parte Casey*, 18 Fed. R. 86.

<sup>3</sup> *Bronson v. Schulten*, 104 U. S. 410, 415.

<sup>4</sup> *Amy v. Watertown*, 130 U. S. 301, 313; *Bronson v. Schulten*, 104 U. S. 410, 415, 416; *Klever v. Seawall*, 65 Fed. R. 873.

<sup>5</sup> *Bronson v. Schulten*, 104 U. S. 410, 415, 416; *Phillips v. Negley*, 117 U. S. 665; *Hickman v. Fort Scott*, 141 U. S. 415; *Hook v. Mercantile Tr. Co.*, 89 Fed. R. 410. But in the District of Delaware a judgment by default



*nobis* was allowed, to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, or the like; or error in the process through default of the clerk."<sup>6</sup> "In practice the same end is now generally attained by motion, sustained, if the case require it, by affidavits; and it is observable that so far has the latter mode superseded the former in the British practice, that Blackstone does not even notice this suit among his remedies."<sup>7</sup> An order may be entered *nunc pro tunc* to embody a decision made at a previous term of the court even in a criminal case;<sup>8</sup> and in a civil case to make special findings previously omitted, conformably to the opinion filed at the judgment term;<sup>9</sup> but not after a writ of error has been decided to insert in a record certain findings, some of which findings were unavoidably and others accidentally omitted.<sup>10</sup> And an order *nunc pro tunc* has no effect upon the statute of limitations;<sup>11</sup> nor can it relate back so as to make a person guilty of contempt for an act done before it was entered.<sup>12</sup> It has been held that a court has power at any time to set aside a judgment which is absolutely void, not merely voidable.<sup>13</sup>

was set aside upon motion at a subsequent term, where the defendant's attorney had believed that the suit was brought in the State court. *Brown v. Phila., W. & B. R. Co.*, 9 Fed. R. 188. It has been held that an order staying plaintiff's proceedings till he pays costs of a former suit is *res adjudicata* upon a subsequent motion, and is so far final that it cannot be set aside or modified at a subsequent term. *Buckles v. Chicago, M. & St. Paul Ry. Co.*, 58 Fed. R. 566.

<sup>6</sup> *Bronson v. Schulten*, 104 U. S. 410, 416, per Miller, J.; *Phillips v. Negley*, 117 U. S. 665. See *Lincoln Nat. Bank v. Perry*, 66 Fed. R. 887.

<sup>7</sup> *Pickett's Heirs v. Legerwood*, 7 Pet. 144, 148, per Johnson, J.

<sup>8</sup> *In re Wight*, 134 U. S. 136; *Supervisors v. Durant*, 9 Wall. 786; *Ætna Ins. Co. v. Boon*, 95 U. S. 117. See *Hickman v. Fort Scott*, 141 U. S. 415.

<sup>9</sup> *Ætna Ins. Co. v. Boon*, 95 U. S. 117.

<sup>10</sup> *Hickman v. Fort Scott*, 141 U. S. 415.

<sup>11</sup> *Fewlass v. Keesham* (C. C. A.), 88 Fed. R. 578, 576.

<sup>12</sup> *Ex parte Buskirk* (C. C. A.), 72 Fed. R. 14.

<sup>13</sup> *U. S. v. Wallace*, 46 Fed. R. 569, 570. For example, a judgment entered in vacation without statutory authority. *Abraham v. Levy* (C. C. A.), 72 Fed. R. 124. Cf. *supra*, § 351.

**§ 380. Executions and proceedings supplementary thereto.** A statute passed June 1, 1872, and incorporated in the Revised Statutes December 1, 1873, provides that "the party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such hereafter enacted which may be adopted by general rules of such Circuit or District Court; and such courts may from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."<sup>1</sup> In pursuance of this statute, the Circuit and District Courts have generally promulgated rules adopting the State practice in this respect.<sup>2</sup> The adoption of such a rule gives the Federal court power to enforce the proceedings supplementary to execution authorized by the State statutes.<sup>3</sup> It has been held that a State statute requiring the registration of a judgment against a municipal corporation in a certain office before its enforcement by execution may apply to the judgment of a Federal court;<sup>4</sup> but that a State statute forbidding the enforcement by execution of a judgment against a municipal corporation does not affect the judgment of a Federal court.<sup>5</sup>

The Revised Statutes provide that "all writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the

§ 380. <sup>1</sup> U. S. R. S., § 916; 4 St. at L., ch. 68, p. 281; *Lamaster v. Keeler*, 123 U. S. 376. The Pennsylvania statute authorizes the sale of a patent right under a special *fiery facias*. Pennsylvania Act of 1870 (P. L. 58); *Erie Wringer Mfg. Co. v. National Wringer Co.*, 63 Fed. R. 248; *Philadelphia & B. C. R. Co.'s Appeal*, 70 Pa. St. 355; *Floyd v. Farnsworth*, 12 Wkly. Notes, 500. Cf. *Ager v. Murray*, 105 U. S. 126; *supra*, § 11.

<sup>2</sup> See for examples the rules pro-

mulgated by the U. S. C. C., S. D. N. Y., October 11, 1878, and December 29, 1881.

<sup>3</sup> *Ex parte Boyd*, 105 U. S. 647; *Canal & C. St. R. Co. v. Hart*, 114 U. S. 654, 661. See § 21.

<sup>4</sup> *Hart v. New Orleans*, 12 Fed. R. 292, 293. See *Louisiana v. New Orleans*, 102 U. S. 203.

<sup>5</sup> *Hart v. New Orleans*, 12 Fed. R. 292; *New Orleans v. Morris*, 3 Woods, 115. See *Merriwether v. Garrett*, 102 U. S. 470.

judgment was obtained.”<sup>6</sup> In cases where a writ of error lies to the Supreme Court, or to a Circuit Court of Appeals, the execution cannot be issued till ten days after the entry of the judgment.<sup>7</sup> The writ may, however, be previously prepared by the clerk.<sup>8</sup> It has been held that when a motion for a new trial is pending after the entry of judgment, the ten days does not begin to run till such motion is denied, and that the denial does not become effective till the order has been filed in the clerk’s office;<sup>9</sup> and that Sundays must be excluded from the computation of the time.<sup>10</sup> A temporary stay of execution may be granted, although no writ of error is sued out, so that other lienholders may enter judgments against the judgment debtor, and thus share in the proceeds of the sale.<sup>11</sup> The court may compel the judgment debtor to give security as a condition of a stay of proceedings of more than ten days after entry of judgment.<sup>12</sup> When it is required by the laws of any State that goods taken in execution on a writ of *fiery facias* shall be appraised before they are sold, the appraisers appointed under the authority of the State may appraise goods taken in execution on such a writ issued out of a court of the United States, in the same manner as if such writ had issued out of a court of such State; and the marshal, in whose custody the goods are, shall summon the appraisers in the same manner as the sheriff is, by the laws of such State, required to summon them, and if the appraisers, after having been duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement.<sup>13</sup> When such appraisers attend, they are entitled to the like fees as in cases of appraisement under the laws of such State.<sup>14</sup> When a marshal dies, or is removed from office, or his term expires, after he has taken under execution any real property and before sale or other final disposition thereof, the like process issues to the succeeding marshal, and the same proceeding is had as if

<sup>6</sup> U. S. R. S., § 985.

<sup>7</sup> U. S. R. S., § 1007; *Danielson v. Northwestern Fuel Co.*, 55 Fed. R. 49.

<sup>8</sup> *Board of Com’rs v. Gorman*, 19 Wall. 661.

<sup>9</sup> *Brown v. Evans*, 18 Fed. R. 56; *Danielson v. Northwestern Fuel Co.*, 55 Fed. R. 49.

<sup>10</sup> *Danielson v. Northwestern Fuel Co.*, 55 Fed. R. 49.

<sup>11</sup> *Eaton v. Cleveland, St. L. & K. C. Ry. Co.*, 41 Fed. R. 421.

<sup>12</sup> *Fisher v. Meyer*, 10 Fed. R. 268.

<sup>13</sup> U. S. R. S., § 993; *Wayman v. Southard*, 10 Wheat. 1.

<sup>14</sup> U. S. R. S., § 993.

his predecessor were still in office.<sup>15</sup> In such a case, when the former marshal has sold the real estate but executed no deed, the court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by the former marshal, order his successor to perfect the title, and execute and deliver a deed to the purchaser upon payment of the balance due.<sup>16</sup> The marshal of the district of the United States has substantially the same powers and duties as a sheriff in one of the counties within such district.<sup>17</sup> In the district of Florida, real property must be sold at the door of the court-house in the county where the land is situated.<sup>18</sup>

The act of March 3, 1893, provides "that all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the court-house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"That hereafter no sale of real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If such property shall be situated in more than one county or State, such notice shall be published in such of the counties where said property is situated as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court, may, in its discretion, direct the publication

<sup>15</sup> U. S. R. S., § 994; *Doolittle v. Bryan*, 14 How. 563. <sup>135</sup> U. S. 1; s. c., 89 Fed. R. 833. See *supra*, § 340.

<sup>16</sup> U. S. R. S., § 994; *Byers v. Fowler*, 12 Ark. 218.

<sup>18</sup> *Bornemann v. Norris*, 47 Fed. R. 438.

<sup>17</sup> U. S. R. S., § 787; *In re Neagle*,

of the notice of sale herein provided for to be made in such other papers as may seem proper.”<sup>19</sup>

The Revised Statutes provide that “all writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may issue and be executed in any part of such State, but shall be issued from and made returnable to the court wherein the judgment was obtained.”<sup>20</sup> It has been held that in such a case the judgment operates as a lien upon real property in the other districts of the same State without the filing of a certified copy there,<sup>21</sup> and that the marshals of the other districts may execute a writ directed to the marshal of the district where the judgment was obtained.<sup>22</sup> Where there is no lien on personal property by reason of a judgment, and executions under judgments in the courts of which they are respective officers are issued to both the marshal and the sheriff, the officer who first makes a levy is entitled to the possession of the property.<sup>23</sup>

Under the Revised Statutes, “interest is allowed on all judgments in civil causes recovered in a Circuit or District Court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State.”<sup>24</sup> The interest is calculated from the date of the judgment, at such rate as is allowed by law on judgments “recovered in the courts of such State.”<sup>25</sup> This statute does not apply to judgments against the United States.<sup>26</sup> This statute does not apply to decrees in equity, nor to judgments or decrees of the Supreme Court of the United States.<sup>27</sup> When a judgment against a municipal corporation was revived against its successor by *scire facias*, the order awarded execution for interest as well as principal.<sup>28</sup> The Revised Statutes further provide that “when a Circuit Court enters judgment in a civil action, either

<sup>19</sup> 27 St. at L. 751. See *supra*, §§ 816, 840.

<sup>20</sup> U. S. R. S., § 985.

<sup>21</sup> *Prevost v. Gorrell*, 5 W. N. C. 151.

<sup>22</sup> *Prevost v. Gorrell*, 5 W. N. C. 151, 152.

<sup>23</sup> *Leopold v. Godfrey*, 50 Fed. R. 145; *supra*, § 9.

<sup>24</sup> U. S. R. S., § 966.

<sup>25</sup> *Ibid.*

<sup>26</sup> *U. S. v. Sherman*, 98 U. S. 565.

<sup>27</sup> *Perkins v. Fourniquet*, 14 How. 828, 831.

<sup>28</sup> *Grantland v. Memphis*, 12 Fed. R.

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upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."<sup>29</sup> "In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term."<sup>30</sup>

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall upon final judgment be provided for and paid out of the proper appropriation from the Treasury."<sup>31</sup> The

<sup>29</sup> U. S. R. S., § 987; *Cambuston v. U. S.*, 95 U. S. 285, 288; *Emma Silver Min. Co. v. Parks*, 14 Blatchf. 411, 413; *Brown v. Evans*, 18 Fed. R. 56.

<sup>30</sup> U. S. R. S., § 988.

<sup>31</sup> U. S. R. S., § 989; *Cox v. Barney*, 14 Blatchf. 289; *Andrae v. Redfield*, 12 Blatchf. 407; *Frerichs v. Coster*, 22 Fed. R. 637; *Schell v. Cochran*, 107 U. S. 625; *U. S. v. Sherman*, 98 U. S. 565; *Campbell v. James*, 3 Fed. R. 513; *Dunnegan v. U. S.*, 17 Ct. Cl. 240, 247; *White v. Arthur*, 10 Fed. R.

80; *Flanders v. Seelye*, 105 U. S. 718. A certificate may be granted by a judge who did not try the case. *Cox v. Barney*, 14 Blatchf. 289. If, however, that judge has denied the application, another judge will rarely, if ever, grant it. *Frerichs v. Coster*, 22 Fed. R. 637. A certificate may be granted before or after an execution is issued. *Cox v. Barney*, 14 Blatchf. 289. A certificate cannot be granted before trial. *Andrae v. Redfield*, 12 Blatchf. 407. In case of appeal or



effect of this statute is after such certificate has been given to practically convert the suit against the officer into a claim against the United States.<sup>32</sup> There is no liability on the part of the government until there has been a recovery against the officer, and a certificate of probable cause has issued.<sup>33</sup> The same rule prevails as to an action against a person "for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty."<sup>34</sup>

**§ 381. Condemnation proceedings.**—The Act of February 9, 1887, provides that "in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District Courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice." "The practice, pleadings, forms, and modes of proceeding in causes arising under

writ of error, no money will be paid out of the Treasury upon the judgment until an affirmance by the appellate court and entry of judgment below in accordance with its mandate. *Schell v. Cochran*, 107 U. S. 625. The postmasters are not included within the statute. *Campbell v. James*, 3 Fed. R. 513. It has been held that after judgment neither the Government nor the collector is liable for interest. *White v. Arthur*, 10 Fed. R. 80. But see *Schell v. Cochran*, 107 U. S. 625. It has been held that when the Government has had no notice, actual or constructive, and no opportunity to defend, it is not concluded by the certificate of probable cause. *Dunnegan v. U. S.*, 17

Ct. Cl. 247. The court is not justified in granting such a certificate to a collector of internal revenue who acted at the request of a revenue agent whose only authority was an instruction from the chief clerk of the supervisor. *Frerichs v. Coster*, 22 Fed. R. 637. The Supreme Court of the United States, upon affirming a judgment in such a case, will allow interest on it, which will be included by the court below in its judgment of affirmance. *Schell v. Cochran*, 107 U. S. 625.

<sup>32</sup> *U. S. v. Sherman*, 98 U. S. 565.

<sup>33</sup> *Ibid.*; *Cox v. Barney*, 14 Blatchf. 289.

<sup>34</sup> 18 St. at L., p. 371.



the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding.”<sup>1</sup> This act is authorized by the Constitution.<sup>2</sup> The petition should be brought in the name of the United States;<sup>3</sup> but if originally filed in the name of the Secretary it may be amended accordingly.<sup>4</sup> The proceeding is in substance and effect an action at common law.<sup>5</sup> In the districts of New York, condemnation proceedings should follow the practice prescribed by Chapter xxiii, Title 1, of the Code of Civil Procedure,<sup>6</sup> but it seems that the petition need not state the facts showing the necessity of the acquisition of the property, nor show that there has been an effort to acquire it by purchase, since those are not matters of form or practice.<sup>7</sup> The provision in the Maryland statute that the petition shall be verified by an agent of the United States is inoperative upon a proceeding presented to the court by an officer designated by an act of Congress.<sup>8</sup> It may be that the issues must be tried by a jury and not before commissioners in accordance with the State practice.<sup>9</sup> If tried before a jury, the jury must be impaneled in accordance with the Federal statutes, and the trial be had before a Federal judge, not before a sheriff’s jury, in accordance with the State practice.<sup>10</sup> Where a trial was had before commissioners, it was held that a provision in the State laws, that the commissioners’ report should be filed in the office of the clerk of the county, would not be followed,<sup>11</sup> but that the report must be filed in the office of the clerk of the Federal court in which the proceedings are instituted.<sup>12</sup> If a trial by jury is had by way of appeal from the award of

§ 381. <sup>1</sup> 25 St. at L., ch. 728, p. 357.

<sup>2</sup> Re Rugheimer, 36 Fed. R. 369; Kohl v. U. S., 91 U. S. 367; Boom Co. v. Patterson, 98 U. S. 403, 406; U. S. v. Jones, 109 U. S. 513.

<sup>3</sup> Chappell v. U. S., 160 U. S. 499, 513. But see Re Rugheimer, 36 Fed. R. 369; s. c., 36 Fed. R. 376; In re Secretary of Treasury, 45 Fed. R. 396.

<sup>4</sup> Chappell v. U. S., 160 U. S. 499, 513.

<sup>5</sup> Ibid.; Re Rugheimer, 36 Fed. R. 376.

<sup>6</sup> In re Secretary of Treasury, 45 Fed. R. 396.

<sup>7</sup> Ibid.

<sup>8</sup> Chappell v. U. S., 160 U. S. 499, 513.

<sup>9</sup> Ibid. But see Luxton v. North River Br. Co., 147 U. S. 337.

<sup>10</sup> Chappell v. U. S., 160 U. S. 499, 513.

<sup>11</sup> Luxton v. North River Br. Co., 147 U. S. 337, 340.

<sup>12</sup> Ibid., 147 U. S. 337, 341.

the commissioners, that trial cannot take place in the Federal court.<sup>13</sup> Neither the Supreme Court nor the Circuit Court of Appeals nor a State court can review the proceedings by *certiorari*, although the State statute gives that right of review to a State court.<sup>14</sup> The proceedings can only be reviewed by writ of error.<sup>15</sup> No writ of error lies "until after final judgment disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error."<sup>16</sup> No writ of error lies to review the order appointing the commissioners of appraisal, although that order may be reviewed on a writ of error to the final order in the proceeding.<sup>17</sup> It has been held that provisions in the State statutes granting costs and counsel fees to the party whose land is taken will be followed by the Federal court;<sup>18</sup> but that upon the dismissal of a condemnation proceeding costs cannot be awarded against the United States, although the State practice allows costs against the petitioner in such a case.<sup>19</sup> An attorney appointed by the court to protect the interests of absent property owners may, perhaps, recover compensation in an independent suit against the United States.<sup>20</sup> Proceedings to condemn lands for fortifications and other works of defense, under the act of August 18, 1890, are properly instituted in a District Court of the United States,<sup>21</sup> although they may also be instituted in a State court.<sup>22</sup>

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid. But see *Wheeling & Belmont Br. Co. v. Wheeling Br. Co.*, 188 U. S. 287, 290.

<sup>17</sup> Ibid.

<sup>18</sup> *U. S. v. Engeman*, 46 Fed. R. 898.

<sup>19</sup> *Carlisle v. Cooper*, 64 Fed. R. 472.

<sup>20</sup> Ibid., 64 Fed. R. 472, 476.

<sup>21</sup> 26 St. at L. 816; *U. S. v. Engeman*, 45 Fed. R. 546; *Chappell v. U. S. (C. C. A.)*, 81 Fed. R. 764; *Chappell v. U. S.*, 160 U. S. 492.

<sup>22</sup> Ibid.

## CHAPTER XXIX.

### REMOVAL OF CAUSES.

**§ 382. Removal of causes from one Federal court to another.**—Suits may be removed from a District Court to a Circuit Court of the United States, from a Circuit Court of the United States to another such Circuit Court, from a Territorial Court to a Circuit Court of the United States, and from a State court to a Circuit Court of the United States. When the judge of a District Court is unable to hold court and to perform the duties of his office, the circuit judge or justice may, upon an application in writing by the district attorney or marshal of the district, accompanied by satisfactory evidence of such disability, order the clerk of the District Court to certify into the next term of the Circuit Court to be held in that district all pending suits and processes.<sup>1</sup> Upon such certification, and the publication of such order in a newspaper published in the district at least thirty days before the session of the Circuit Court, the Circuit Court proceeds to hear and determine the suits and processes so certified.<sup>2</sup> All bonds and recognizances taken for and returnable into such District Court are then held to be taken for and returnable into such Circuit Court, and to have the same effect therein as in the District Court.<sup>3</sup> The death of a district judge does not authorize such an order.<sup>4</sup> After such an order has been made, the clerk continues to certify to the Circuit Court all suits, pleas, and processes, civil and criminal, thereafter begun in the District Court; and the Circuit Court takes, hears, and determines them till the disability is removed, when such suits and proceedings as are still pending and undetermined must be remanded by the Circuit to the District Court.<sup>5</sup>

When it appears in any civil suit in a Circuit Court that all of the judges thereof who are competent to try the case are in

<sup>1</sup> U. S. R. S., § 587.

<sup>2</sup> U. S. R. S., § 587.

<sup>3</sup> U. S. R. S., § 587.

<sup>4</sup> *Ex parte U. S.*, 1 Gall. 388.

<sup>5</sup> U. S. R. S., § 588.

any way interested therein, or have been of counsel for either party, or are so related or connected with either party as to render it, in the opinion of the court, improper for them to sit upon the trial, the court must order the fact to be entered on the record, and order the certification of the cause to the most convenient Circuit Court in the next adjoining State, or in the next adjoining circuit, that is, ordinarily the nearest Circuit Court, with a judge competent to try the cause; and the court to which the cause is thus certified must then hear and determine the case, unless the circuit justice or judge thereof remands it.<sup>6</sup>

When a Territory is admitted as a State, and a District Court established therein, such District Court takes cognizance of and hears and determines all cases pending undetermined in the Superior Court of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court of the United States.<sup>7</sup> All records of proceedings in cases pending in the court of appeals of such a Territory at the time of its admission, and all records of proceedings in which judgments or decrees had been rendered in such a Territorial court before that time, and from which writs of error could have been sued out or appeals taken, or from which writs of error had been taken, or appeals taken and prosecuted to the Supreme Court of the

<sup>6</sup> U. S. R. S., §§ 615, 616; *Richardson v. Boston*, 1 Curt. 250; *Supervisors v. Rogers*, 7 Wall. 175; *Sawyer v. Oakman*, 11 Blatchf. 65; *Stuart v. Laird*, 1 Cranch, 299. See *Lewis v. Johnson*, 90 Fed. R. 678.

<sup>7</sup> U. S. R. S., § 569; 25 St. at L., ch. 180, § 22, p. 682; *Forsyth v. U. S.*, 9 How. 571; *Ames v. Colorado Cent. R. Co.*, 4 Dill 251; *Gaffney v. Gillette*, 4 Dill 264, n.; *Strasburger v. Beecher*, 44 Fed. R. 209; *U. S. v. Lynde*, 44 Fed. R. 215; *Nickerson v. Crook*, 45 Fed. R. 658; *Carson v. Donaldson*, 45 Fed. R. 821; *Dunton v. Muth*, 45 Fed. R. 390; *Bluebird Min. Co. v. Murray*, 45 Fed. R. 388; *Herman v. McKinney*, 43 Fed. R. 689; *Dorne v. Richmond S. Min. Co.*, 43 Fed. R. 690; *U. S. v. Taylor*, 44 Fed. R. 2; *Carr v. Fife*, 44

Fed. R. 718; *Hamilton v. The Walla Walla*, 44 Fed. R. 4; *Johnson v. Bunker Hill & S. M. & C. Co.*, 46 Fed. R. 417; *Burke v. Bunker Hill & S. M. & C. Co.*, 46 Fed. R. 644; *Back v. Sierra Nevada Con. Min. Co.*, 46 Fed. R. 673; *Kenyon v. Knipe*, 46 Fed. R. 309; *Washington & Idaho R. Co. v. Cœur d'Alene Ry. & Nav. Co.*, 160 U. S. 77; *Glaspell v. No. Pac. R. Co.*, 144 U. S. 211; *Koenigsberger v. Richmond S. Min. Co.*, 158 U. S. 41; *Cowley v. No. Pac. R. Co.*, 159 U. S. 569; *McCormick v. W. U. Tel. Co. (C. C. A.)*, 79 Fed. R. 449; *U. S. v. Baum*, 74 Fed. R. 43; *Hecht v. Metzler*, 82 Fed. R. 340; *Sargent v. Kindred*, 49 Fed. R. 485; *Crown Pt. Min. Co. v. Ontario S. M. Co.*, 74 Fed. R. 419; *Fraser v. Trent*, 74 Fed. R. 423.

United States, must be transferred to and deposited in the District Court for such new State.<sup>8</sup>

§ 383. Cases which may be removed from a State court to a Circuit Court of the United States.—By section 2 of the Judiciary Act of 1875, as amended in 1887, “Any suit of a civil nature at law or in equity arising under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States” have original jurisdiction, whether now pending or hereafter brought, “may be removed by the defendant or defendants thereto from a State court into the Circuit Court of the United States for the proper district.”<sup>1</sup> Where the plaintiff’s pleading does not show that his cause of action arises under the Constitution or laws of the United States, the defendant cannot remove the case because his defense depends upon a provision of such laws or Constitution.<sup>2</sup> An omission in this respect in the plaintiff’s pleading is not cured by an amendment of the same filed after the petition for a removal.<sup>3</sup>

Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States have original jurisdiction under the Judiciary Act of 1887, namely, in which there is a controversy between citizens of different States or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, or in which there is a controversy between citizens of the same State claiming lands under grants of different States, can be removed into the Circuit Court of the United States for the proper district

<sup>8</sup> U. S. R. S., §§ 567, 568; *Benner v. Porter*, 9 How. 235; *Forsyth v. U. S.*, 9 How. 571; *Express Co. v. Kountze*, 8 Wall. 342.

§ 383. <sup>1</sup> 24 St. at L., ch. 373, p. 552. See *supra*, §§ 15, 17. It has been held that a case arising under the revenue laws cannot be removed unless the value of the matter in dispute, exclusive of interest and costs, exceeds \$2,000, although the Federal court might have had original jurisdiction over the same. *Johnson v. Wells, Fargo & Co.*, 91 Fed. R. 1. All the defendants must

join in the petition for a removal. *Yarnell v. Felton*, 104 Fed. R. 161; *Chicago, R. I. & Pac. Ry. Co. v. Martin*, 178 U. S. 245. But see *So. Pac. R. Co. v. Townsend*, 62 Fed. R. 161.

<sup>2</sup> *Oregon S. L. & U. N. Ry. Co. v. Skottowe*, 162 U. S. 490; *Tennessee v. Union & P. Bank of Com.*, 152 U. S. 454; *Chappell v. Waterworth*, 155 U. S. 102; *Postal Tel. C. Co. v. Alabama*, 155 U. S. 482; *East L. L. Co. v. Brown*, 155 U. S. 488, 180 U. S. 585.

<sup>3</sup> *Caples v. Texas & P. Ry. Co.*, 67 Fed. R. 9.

only by the defendant or defendants therein;<sup>4</sup> and not by them, except when they claim land under grants of different States, unless they are non-residents of that State;<sup>5</sup> nor, it seems, unless they all unite in the application for a removal<sup>6</sup> in every case where there is no separable controversy.<sup>7</sup> It has been held that the section of the Removal Act just cited refers only to the general grant of jurisdiction at the beginning of the preceding section of the statute, not to the special regulations as to the district in which an action may be commenced; that consequently a suit pending in a State court between citizens of different States, no one of whom is a citizen or resident of the State where the suit is brought, may be removed into the Federal court in the district including that State,<sup>8</sup> and

<sup>4</sup> 24 St. at L. 552; *Fletcher v. Hamlet*, 116 U. S. 408; *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 358; *Mills v. Newell*, 41 Fed. R. 529; *supra*, §§ 15, 16, 18-24. But see *Mutual Life Ins. Co. v. Champlin*, 21 Fed. R. 85; *Foster's Federal Judiciary Acts*, 26-29.

<sup>5</sup> *Martin v. Snyder*, 148 U. S. 663; *Wichita Nat. Bank v. Smith* (C. C. A.), 72 Fed. R. 568. It has been held that a resident alien defendant cannot thus remove a case unless there is a Federal question, *Walker v. O'Neill*, 88 Fed. R. 874; *Cooley v. McArthur*, 85 Fed. R. 872; *Cudahy v. McGeoch*, 87 Fed. R. 1; that a suit brought in a State court by an alien against a non-resident citizen of another State, *Sherwood v. Newport N. & M. Tel. Co.*, 55 Fed. R. 1; *Uhle v. Burnham*, 42 Fed. R. 1; or against a corporation incorporated by another State, *Stalker v. Pullman's Palace Car Co.*, 81 Fed. R. 989; can be removed by the defendant. The naturalization of an alien who has removed a case does not justify a remand. *Haracovic v. Standard Oil Co.*, 105 Fed. R. 785. It is doubtful whether a suit can be removed in which an alien is on the same side of the controversy as a citizen of the

United States, although the latter and the party on the other side are citizens of different States. *Tracy v. Morell*, 88 Fed. R. 801; *King v. Correll*, 106 U. S. 895; *Merchants' C. P. & S. Co. v. Insurance Co. of N. A.*, 151 U. S. 368, 386. It was held that such a suit is removable. *Roberts v. Pac. & A. Ry. & Nav. Co.*, 104 Fed. R. 577. "It is well settled that, as regards the right of removal, substituted parties have no other nor greater rights than the party in whose stead they are substituted." *Burnham v. First Nat. Bank of Leith* (C. C. A.), 53 Fed. R. 163, 166, per *Shiras, J.*

<sup>6</sup> *Fletcher v. Hamlet*, 116 U. S. 408; *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 358; *Arkansas V. Sm. Co. v. Cowenhoven*, 41 Fed. R. 450; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. R. 778; *Yarnell v. Felton*, 102 Fed. R. 369. *Contra*, *Mutual Life Ins. Co. v. Champlin* (S. D. N. Y.), 21 Fed. R. 85; *Garner v. Second Nat. Bank of Providence* (D. R. I.), 63 Fed. R. 369; *Boston S. D. & Tr. Co. v. Mackay* (S. D. N. Y.), 70 Fed. R. 801.

<sup>7</sup> See *infra*, § 384.

<sup>8</sup> *Amsinck v. Balderston*, 41 Fed. R. 641, per *Gray, J.*; *Uhle v. Burnham*, 42 Fed. R. 1; *Baltimore & O.*



that an action commenced by attachment in the State court can be removed.<sup>9</sup> In determining between whom the controversy exists the court is not bound by the title of the cause nor by the form of the pleadings, but will examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the controversy, no matter what their technical position as plaintiffs or defendants may be.<sup>10</sup>

It has been held that a suit between a State and a citizen of another State cannot be removed where no Federal question is involved;<sup>11</sup> and that a case can be removed where one of several plaintiffs is not a citizen of the State where it was brought;<sup>12</sup> and that where the plaintiff sued upon a cause of action which arose in his own right, and in which the value of the matter in dispute exceeded \$2,000, the defendant was not

*R. Co. v. Meyers* (C. C. A.), 62 Fed. R. 867, 872. See also *Gavin v. Vance*, 83 Fed. R. 84, 92; *Swain v. Boylston Ins. Co.*, 37 Fed. R. 766; *Wilson v. W. U. Tel. Co.*, 84 Fed. R. 561; *Kansas City & T. R. Co. v. Interstate L. Co.*, 37 Fed. R. 8; *Burck v. Taylor*, 39 Fed. R. 581; *Cooley v. McArthur*, 35 Fed. R. 372. But see *Harold v. Iron S. Min. Co.*, 33 Fed. R. 529; *Smith v. Lyon*, 133 U. S. 815.

<sup>9</sup> *Crocker Nat. Bank v. Pengenstecher*, 44 Fed. R. 705; *Vermilya v. Brown*, 65 Fed. R. 149; *Long v. Long*, 73 Fed. R. 869. *Cf. Benthif v. London & C. F. Corp. Ltd.*, 44 Fed. R. 667.

<sup>10</sup> *Supra*, § 18; *Removal Cases*, 100 U. S. 457, 468; *Pacific R. Co. v. Ketchum*, 101 U. S. 289; *Barney v. Latham*, 103 U. S. 205; *Carson v. Hyatt*, 118 U. S. 279, 286; *Judah v. Iowa B. W. Co.*, 32 Fed. R. 561; *Wilson v. Oswego Tp.*, 151 U. S. 56; *Bacon v. Rives*, 106 U. S. 99; *Wolcott v. Sprague*, 55 Fed. R. 545; *Scoutt v. Keck* (C. C. A.), 73 Fed. R. 900; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. R. 9, 14; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 186; *Horn Silver Mining Co. v. New York State*, 143 U. S. 305, 317; *Carver v. Jarvis-Conklin Tr. Co.*, 73 Fed. R. 9; *Missouri v. Alt*, 73 Fed.

R. 302; *Hunter v. Conrad*, 85 Fed. R. 803. See *Garrard v. Silver Peak Mines*, 76 Fed. R. 1. But see *Seddon v. Virginia, T. & C. S. R. Co.*, 36 Fed. R. 6; *Putnam v. Ingraham*, 114 U. S. 57; *Sloane v. Anderson*, 117 U. S. 275, 278; *Missouri v. New Madrid Cy.*, 73 Fed. R. 304. It has been held that the fact that a defendant has filed a cross-bill against a co-defendant does not make him a plaintiff and thus deprive of any right of removal which he would have otherwise. *Jackson & S. Co. v. Pearson*, 60 Fed. R. 113, 123. The pleading by the original defendant of a counter-claim or demand in re-convention does not make the original plaintiff a defendant and authorize him to remove the case. *Waco Hardware Co. v. Michigan Stove Co.* (C. C. A.), 91 Fed. R. 289; *McKown v. Kansas & T. Coal Co.*, 105 Fed. R. 657. Defendants, who are described in the plaintiff's pleading as unknown, need not join in the petition. *Walker v. Richards*, 55 Fed. R. 129; *Parkinson v. Barr*, 105 Fed. R. 81.

<sup>11</sup> *Indiana v. Alleghany Oil Co.*, 85 Fed. R. 870.

<sup>12</sup> *Alley v. Edward Hines Lumber Co.*, 64 Fed. R. 903. But see *Smith v. Lyon*, 133 U. S. 815.



deprived of his right to remove the case, because of a joinder in the same complaint of another cause of action that had been assigned to the plaintiff, the record not showing the citizenship of the assignor.<sup>13</sup> A case can be removed for a difference of citizenship, where that does not appear in the plaintiff's pleading, provided it is shown in the petition for a removal.<sup>14</sup> When in any suit of a civil nature, now pending or hereafter brought in a State court, there are two or more separable causes of action, and in respect to one of them all the necessary parties on one side are citizens of different States from those on the other, either one or more of the defendants interested in such controversy may remove the suit into the Circuit Court of the United States for the proper district.<sup>15</sup> Such removal may be had by any defendant, irrespective of his residence or citizenship.<sup>16</sup>

“Where a suit is now pending or may be hereafter brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause.”<sup>17</sup>

The Revised Statutes provide that “when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title,

<sup>13</sup> *Sharkey v. Port B. M. Co.*, 92 Fed. R. 425; *s. c.* (C. C. A.), 102 Fed. R. 259; *Hoge v. Canton Ins. Office*, 103 Fed. R. 513. But see *infra*, § 393.

<sup>14</sup> *Ysleta v. Canda*, 67 Fed. R. 6; *infra*, § 385a.

<sup>15</sup> 24 St. at L., ch. 373, p. 552; *infra*, § 384.

<sup>16</sup> *Stanbrough v. Cook*, 88 Fed. R. 369.

<sup>17</sup> 24 St. at L., ch. 373, p. 552. For the practice in such a case see *infra*, § 386.

or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant.”<sup>18</sup> It has been held that this statute is constitutional;<sup>19</sup> that it gives the right of removal to a corporation constructing a building under the authority of the Secretary of the Treasury;<sup>20</sup> and that a proceeding to punish a collector of internal revenue for contempt in refusing to permit a sheriff to enter a bonded warehouse may be removed.<sup>21</sup>

In an action against any person for or on account of anything done by him while an officer of either House of Congress, in the discharge of his official duty, the district attorney of the United States for the district where the suit is brought must appear for such officer at his request; and he has the same right of removal as a revenue officer in the cases above mentioned, which right must be similarly exercised.<sup>22</sup>

“When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the

<sup>18</sup> U. S. R. S., § 643, as amended by 28 St. at L., p. 36. For practice see *infra*, § 388.

<sup>19</sup> *Tennessee v. Davis*, 100 U. S. 257.

<sup>20</sup> *Ward v. Congress Const. Co. (C. C. A.)*, 99 Fed. R. 598.

<sup>21</sup> *McCullough v. Large*, 20 Fed. R. 809.

<sup>22</sup> 18 St. at L., ch. 180, § 8, p. 401 (1 Supp. R. S. U. S., p. 165). This act was passed on account of the case of *Kilbourn v. Thompson*, 108 U. S. 168; S. C., MoA. & M. 401.

petition of such defendant, filed in such State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending."<sup>23</sup> This statute gives no relief to prevent or cure wrongs committed by judicial tribunals in the administration of a constitutional law.<sup>24</sup>

An action by a State or by a public officer to recover a penalty is criminal, not civil in its nature; and it can be removed only upon a ground on which a criminal prosecution may be removed;<sup>25</sup> even, it has been held, where the State statute declares it to be a civil action;<sup>26</sup> or where a count for the penalty is joined with another count for damages.<sup>27</sup> An information in equity to enjoin the violation of a State anti-trust law was held not to be removable.<sup>28</sup> But a statutory summary proceeding by a landlord to eject a tenant is removable.<sup>29</sup> So is a proceeding to collect delinquent taxes under the laws of North Dakota;<sup>30</sup> and an action to recover damages for negligence;<sup>31</sup> even under the Massachusetts statute which also provides for a fine payable to the personal representative after conviction upon an indictment;<sup>32</sup> and such an action may be maintained in a Federal court sitting in another State.<sup>33</sup> A proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, is considered as purely administrative in its character, and not in any just sense a suit; but an appeal from the decision in such a proceeding may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or

<sup>23</sup> U. S. R. S., § 641.

<sup>24</sup> *Virginia v. Rives*, 100 U. S. 818, 820; *California v. Chue Fau*, 42 Fed. R. 865.

<sup>25</sup> *Ferguson v. Ross*, 38 Fed. R. 161; *Texas v. Day L. & C. Co.*, 41 Fed. R. 228; *Iowa v. Chicago, B. & Q. R. Co.*, 37 Fed. R. 497; *Dey et al., R. R. Com'rs, v. Chicago, M. & St. P. R. Co.*, 45 Fed. R. 82.

<sup>26</sup> *Indiana v. Alleghany Oil Co.*, 85 Fed. R. 870.

<sup>27</sup> *Texas v. D. L. & C. Co.*, 49 Fed. R. 593.

<sup>28</sup> *Moloney v. Am. T. Co.*, 72 Fed. R. 801.

<sup>29</sup> *Gallatin v. Sherman*, 77 Fed. R. 337.

<sup>30</sup> *In re Stutsman County*, 88 Fed. R. 237.

<sup>31</sup> *Brisenden v. Chamberlain*, 58 Fed. R. 807; *Boston & M. R. Co. v. Hurd (C. C. A.)*, 108 Fed. R. 116.

<sup>32</sup> *Boston & M. R. Co. v. Hurd (C. C. A.)*, 108 Fed. R. 116. *Contra*, *Lyman v. Boston & A. R. Co.*, 70 Fed. R. 409; *Perkins v. Boston & A. R. Co.*, 90 Fed. R. 321.

<sup>33</sup> *Boston & M. R. Co. v. Hurd (C. C. A.)*, 108 Fed. R. 116; *Dennick v. Central R. Co.*, 103 U. S. 11; *Stewart v. B. & O. R. Co.*, 168 U. S. 445.

without a jury, and if there are parties litigant to contest the case on the one side and the other.<sup>34</sup> Thus, an appeal under a State law from an assessment of taxes to "a County Court," which in respect to such proceedings acts not as a judicial body, but as a board of commissioners without judicial power and only authorized to determine questions of quantity, proportion, and value, is not a suit which can be removed to a Federal court.<sup>35</sup> An appeal to a court of Indiana from the decision of the Board of County Commissioners, upon a claim against a county, is considered as a suit which may be removed to the proper Federal court.<sup>36</sup>

The general rule with regard to condemnation proceedings is that the initial proceeding of the appraisement by commissioners is an administrative proceeding and not a suit which can be removed; but that if an appeal is taken to a court, and a litigation is then instituted between parties, the proceeding thereupon becomes a suit which may be removed.<sup>37</sup>

<sup>34</sup> Delaware C. Com'rs v. Diebold S. & L. Co., 138 U. S. 473; Upshur County v. Rich, 135 U. S. 474-477, per Bradley, J.

<sup>35</sup> Upshur County v. Rich, 135 U. S. 467; Fuller v. County of Colfax, 14 Fed. R. 177. So of an assessment for local improvements. In re Chicago, 64 Fed. R. 897. But it was held that a special statutory proceeding for the establishment of a drain under the Indiana laws is, after the filing of the commissioners' report in the State Circuit Court and the filing of remonstrances thereto, a controversy of a "civil nature" which may be removed when the requisite difference of citizenship, etc., exists. In re The Jarnecke Ditch, 69 Fed. R. 161.

<sup>36</sup> Delaware C. Com'rs v. Diebold S. & L. Co., 138 U. S. 473. See also Tullock v. Webster County, 40 Fed. R. 706. In such a case the claimant was considered as the plaintiff, although the appeal had been taken by a taxpayer from a decision allowing the claim. Tullock v. Webster County, 40 Fed. R. 706.

<sup>37</sup> Upshur County v. Rich, 135 U. S. 467, 475; Boom Co. v. Patterson, 98 U. S. 403; Pacific Railroad Removal Cases, 115 U. S. 1, 18; Searl v. School District, 124 U. S. 197, 199; Warren v. W. V. Ry. Co., 6 Bissell, 425; Bannigan v. Worcester, 30 Fed. R. 392; Kansas City & T. R. Co. v. Interstate L. Co., 37 Fed. R. 8. A petition filed by a railway company with the Connecticut railroad commissioners for the purpose of obtaining their consent to the taking of certain land by condemnation proceedings, is not a suit which can be removed. N. Y., N. H. & H. R. Co. v. Cockroft, 46 Fed. R. 881.

It was held that a proceeding in *West Virginia* in which was involved the right of the applicant to condemn lands for a public purpose was removable. Sugar Creek, P. & P. C. Ark. Co. v. McKell, 75 Fed. R. 34. That condemnation proceedings under the *Connecticut* railroad law cannot be removed. Hartford & C. W. R. Co. v. Montague, 94 Fed. R. 227. That in *New Hampshire*, if the landowner be regarded as a plaintiff he

The courts of the United States have no probate jurisdiction.<sup>38</sup> When, however, a statute or customary law of a State gave its courts jurisdiction of a suit to establish a lost will, or to set aside a probate of a will or to annul a will, it was held under former statutes that the Federal court might take jurisdiction of such a suit upon removal.<sup>39</sup> A Federal court cannot undertake the general administration of a decedent's estate.<sup>40</sup>

cannot remove the condemnation proceeding. *Mt. Washington Ry. Co. v. Coe*, 50 Fed. R. 637. That in *New Jersey* a land-owner who has appealed from the decision of the commissioners should be regarded as the defendant and may remove the appeal, but that he waives his right of removal by having the record of the proceedings sent to the State Supreme Court by *certiorari*. *Hudson River R. & T. Co. v. Day*, 54 Fed. R. 545. That in *Massachusetts* a proceeding for the assessment of damages suffered by millers by reason of the diversion of water was removable. *Banigan v. Worcester*, 30 Fed. R. 392. That condemnation proceedings are removable in *North Carolina*, *Postal Tel. C. Co. v. So. Ry. Co.*, 88 Fed. R. 803; in *Colorado*, *Searle v. School District*, 124 U. S. 197; *Colorado Midland Ry. Co. v. Jones*, 29 Fed. R. 193; in *Michigan*, where they should be removed from the Probate Court, *Mineral Range R. Co. v. Detroit & L. S. Copper Co.*, 25 Fed. R. 515; in *Missouri*, *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. R. 3; in *Oregon*, *No. Pac. Terminal Co. v. Lowenberg*, 18 Fed. R. 389; in *Indiana*, *Terre Haute v. Evansville, F. & T. H. R. Co.*, 106 Fed. R. 551; and in *Iowa*, where, if the land-owner alone appeals, the railway company is considered as the defendant. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. R. 551. The value placed upon the land by the owner, unless made in bad faith, is the value of the matter in dispute. *Postal Tel. C. Co. v. So. Ry. Co.*, 88 Fed. R. 803.

The demand for a jury trial under the North Dakota statute is equivalent to the filing of an answer, and after the time to do this had expired, it was held too late to remove the cause. *Minneapolis, St. P. & S. S. Ry. Co. v. Nestor*, 50 Fed. R. 1.

<sup>38</sup> *Fouvergne v. New Orleans*, 18 How. 70; *Southworth v. Howard*, 11 Rep. 46; *Reed v. Reed*, 31 Fed. R. 49. But see *Brodhead v. Shoemaker*, 44 Fed. R. 518.

<sup>39</sup> *Gaines v. Fuentes*, 92 U. S. 10; *Southworth v. Howard*, 11 Rep. 46, under the Act of 1875. See also *Ellis v. Davis*, 109 U. S. 485; *Reed v. Reed*, 31 Fed. R. 49; *Foster's Federal Judiciary Acts*, pp. 4, 27.

It has been held that appeals from the decrees of Probate Courts admitting wills to probate are not removable from the courts of New Hampshire, *In re Cilley*, 58 Fed. R. 977; Pennsylvania, *In re Aspinwall's Estate*, 85 Fed. R. 851; and Arkansas, *Wahl v. Franz (C. C. A.)*, 100 Fed. R. 680. As to Indiana see *Copeland v. Bruning*, 72 Fed. R. 5. But such proceedings in Georgia were held to be removable from the appellate court. *Brodhead v. Shoemaker*, 44 Fed. R. 518. Jurisdiction was taken of a proceeding under the Oregon statutes to contest a will. *Richardson v. Green (C. C. A.)*, 61 Fed. R. 423. In Alabama upon a contest on the admission of a will to probate, the person applying for the probate is the plaintiff, and he cannot remove the cause. *McDonnell v. Jordan*, 178 U. S. 229, 237.

<sup>40</sup> *Byers v. McAuley*, 149 U. S. 608;

A proceeding in a court of probate under a statute providing for the trial there of claims against a decedent's estate, may be removed, although the State statute provides that such a court of probate shall have exclusive jurisdiction over such proceedings.<sup>41</sup> An action in the nature of a *quo warranto* may be removed when it arises under the Constitution and laws of the United States.<sup>42</sup> It seems that a proceeding upon an application for a *habeas corpus* cannot.<sup>43</sup> It seems that no removal can be had, since the Act of 1887, of a suit of which the Circuit Court could not take original jurisdiction, such as an application for a mandamus;<sup>44</sup> a creditor's bill when the plaintiff has not reduced his claim to judgment;<sup>45</sup> or an action for a divorce.<sup>46</sup> A suit which is ancillary and supplemental to a suit previously brought in a State court, and which is so connected with the original suit as to form an incident to it and be substantially a continuation of it, cannot be removed into a Circuit Court of the United States unless the original suit has been previously or may be simultaneously removed.<sup>47</sup> A bill to

*supra*, § 9. Proceedings to determine whether the estate of a decedent is separate or community property, *In re Foley*, 80 Fed. R. 949; and, it seems, proceedings upon the application of the widow for a year's support, *McElmurray v. Loomis*, 31 Fed. R. 395, cannot be removed. But it has been held that a special proceeding by an administrator to obtain a license to sell land may be removed, although not within the original cognizance of the Federal court: and that such a proceeding, although treated by the State court as equitable in its nature, must be placed on the common-law docket of the Federal court. *Elliott v. Shuler*, 50 Fed. R. 454.

<sup>41</sup> *Hess v. Reynolds*, 118 U. S. 78; *Clark v. Bever*, 139 U. S. 96, 102. See *Wilson v. Smith*, 66 Fed. R. 81.

<sup>42</sup> *Ames v. Kansas*, 111 U. S. 449; *Illinois v. Ill. Cent. R. Co.*, 33 Fed. R. 721. But it has been held that a *quo warranto* brought to test a title to office in a corporation organized in

the State where the suit was brought cannot be removed because of a difference of citizenship between defendant and relator. *Place v. Illinois (C. C. A.)*, 69 Fed. R. 481.

<sup>43</sup> *Kurtz v. Moffitt*, 115 U. S. 487; *Snow v. U. S.*, 118 U. S. 846, 854.

<sup>44</sup> *Indiana ex rel. City of Muncie v. L. E. & W. Ry. Co.*, 85 Fed. R. 1.

<sup>45</sup> *Cates v. Allen*, 149 U. S. 451; *First Nat. Bank v. Praegler (C. C. A.)*, 91 Fed. R. 689.

<sup>46</sup> *Barber v. Barber*, 21 How. 582, 584; *Johnson v. Johnson*, 13 Fed. R. 193; *Bowman v. Bowman*, 30 Fed. R. 849. A suit to enforce a decree awarding alimony might perhaps be removed. *Ibid.*

<sup>47</sup> *Barrow v. Hunton*, 99 U. S. 80, 82; *Webber v. Humphreys*, 2 Dill. 223; *Poole v. Thatcherdeft*, 19 Fed. R. 49; *Buford v. Strother*, 3 McCrary, 253; s. c., 10 Fed. R. 406; *Flash v. Dillon*, 22 Fed. R. 1; *Chapman v. Barger*, 4 Dill. 557; *Wolcott v. Aspen M. & S. Co.*, 34 Fed. R. 821; *Richmond & D. R. Co. v. Findley*, 32



set aside a judgment or decree of a State court for mistake<sup>48</sup> or fraud which was not and could not, with the exercise of reasonable diligence, have been discovered before the decree passed beyond the control of the State court, may be removed.<sup>49</sup>

Fed. R. 641; *Kalamazoo W. Co. v. Snavely*, 84 Fed. R. 828; *Marshall v. Holmes*, 141 U. S. 589; *supra*, § 21. Such are statutory proceedings supplementary to execution, *Webber v. Humphreys*, 5 Dill. 228; *Poole v. Thatcherdeft*, 19 Fed. R. 49; *Buford v. Strother*, 8 McCrary, 253; s. c., 10 Fed. R. 406; *Flash v. Dillon*, 22 Fed. R. 1; including the appointment of a receiver in such supplementary proceedings. *Cœur d'Alene Ry. & N. Co. v. Spalding*, 98 Fed. R. 28. A petition by the defendant after judgment for plaintiff in ejectment to have the defendant's damages allowed to him. *Chapman v. Barger*, 4 Dill. 557. A suit in equity by the tenant under a lease pending an action of ejectment to set up a defense which might by the State practice have been pleaded in the action of ejectment. *Richmond & D. R. Co. v. Findley*, 32 Fed. R. 621. See *Cable v. Ellis*, 110 U. S. 889; *Johnson v. Christian*, 125 U. S. 642. A proceeding by the plaintiff, after a decree establishing his right to the products of a mine, to enforce his rights under the decree against the defendant to the original suit and a third person who claims a superior title by purchase. *Wolcott v. Aspen M. & S. Co.*, 84 Fed. R. 821. A proceeding against the directors of a defunct railway company which has passed out of existence pending a suit against it, seeking to hold them liable to the original plaintiff under a State statute to the extent of its assets in their hands. *Houston & Texas Cent. R. Co. v. Shirley*, 111 U. S. 858. See also *Hospes v. N. W. Mfg. & C. Co.*, 22 Fed. R. 565. But

it was held that removals can be had of a motion for an execution against a stockholder under Mo. R. S., § 2517, after judgment and return of execution against the corporation, *Lackawana C. & I. Co. v. Bates*, 56 Fed. R. 737; a bill in equity setting up a prior judgment for damages for a nuisance and a pending action at law for the same purpose, which prays consolidation, a perpetual injunction and damages subsequent to the commencement of the pending action at law, *Ladd v. West*, 55 Fed. R. 858; and a bill to set aside a decree of a State court for fraud which does not show that the facts constituting the fraud were not within the knowledge of the complainant before the rendition of the decree, or could not have been discovered in time to bring them in some appropriate mode to the attention of the State court while the decree was within its control. *Nougué v. Clapp*, 101 U. S. 551; *Graham v. Boston H. & E. R. Co.*, 118 U. S. 161, 177; *Marshall v. Holmes*, 141 U. S. 589, 600.

<sup>48</sup> *Pelzer Mfg. Co. v. Hamburg B. F. Ins. Co.*, 62 Fed. R. 1.

<sup>49</sup> *Marshall v. Holmes*, 141 U. S. 589, 600; *Johnson v. Waters*, 111 U. S. 640, 667; *Arrowsmith v. Gleason*, 129 U. S. 86, 101; *Carver v. Jarvis-Conklin Mtge. Tr. Co.*, 73 Fed. R. 9. So it has been held of a proceeding to enjoin the violation of a decree by a stranger to the suit. *Ward v. Congress Const. Co. (C. C. A.)*, 99 Fed. R. 598. And a feigned issue in Pennsylvania to try the validity of a judgment obtained by a creditor. *Fuller v. Wright*, 28 Fed. R. 838.



A creditor's bill founded on a State judgment may be removed.<sup>50</sup> A suit in which a State court has appointed a receiver may be removed;<sup>51</sup> and so may a suit for the appointment of a receiver ancillary to one previously appointed by a court of another State.<sup>52</sup>

A case where the record does not show that the Federal court could otherwise take jurisdiction cannot be removed by consent;<sup>53</sup> and where consent is given because of prejudice or local influence, an order of removal upon that ground must be obtained.<sup>54</sup> An agreement by a corporation not to remove into a Federal court any suit brought against it within a State is void.<sup>55</sup> A State has the power to exclude from its limits any corporation not engaged in interstate or international commerce and not in the service of the United States; and it seems that the courts will not examine into the reasons for such exclusion, provided the statute under which it is made is constitutional, although the corporation is excluded because it has removed a case into a Federal court.<sup>56</sup> A State court cannot enjoin the removal of a case.<sup>57</sup> A stipulation not to remove a specified suit into a Federal court has been held valid.<sup>58</sup>

§ 384. *Separable controversies.*—To entitle a defendant to a removal on account of the separability of a controversy from the rest of the case, there must exist a separate cause of action on which a separate suit could be brought and complete relief afforded distinct from the rest of the case, and of which

<sup>50</sup>Kalamazoo Wagon Co. v. Snavely, 84 Fed. R. 828.

<sup>51</sup>In re Iowa & M. Const. Co., 10 Fed. R. 401. Whether an action of replevin brought against a State sheriff to recover property on which he has levied by writ of attachment can be removed, has been doubted. Burnham v. First Nat. Bank (C. C. A.), 53 Fed. R. 163.

<sup>52</sup>Shinney v. N. A. Sav. L. & B'g Co., 97 Fed. R. 9.

<sup>53</sup>People's Bank v. Calhoun, 103 U. S. 258.

<sup>54</sup>Olds Wagon Works v. Benedict (C. C. A.), 67 Fed. R. 1.

<sup>55</sup>Paul v. Virginia, 8 Wall. 163; Doyle v. Continental Ins. Co., 94 U. S.

585; Gloucester F. Co. v. Pennsylvania, 114 U. S. 196; Phila. F. Ass'n v. New York, 119 U. S. 110; Barron v. Burnside, 121 U. S. 186; Chicago, M. & St. P. Co. v. Becker, 32 Fed. R. 849; So. Pac. Co. v. Denton, 146 U. S. 202, 207; In re Foley, 76 Fed. R. 390. See Am. Law Review for May-June, 1892, and September-October, 1892.

<sup>56</sup>Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186.

<sup>57</sup>Blydenstein v. N. Y. S. & Tr. Co., 59 Fed. R. 12. A stay in a State court does not prevent a removal. Hulbert v. Russo, 64 Fed. R. 8.

<sup>58</sup>Hanover Nat. Bank v. Smith, 13 Blatchf. 224.

all the parties on one side are citizens of different States from all the parties on the other.<sup>1</sup> The case must be separable into parts, so that in one of the parts a controversy will be pre-

§ 384. <sup>1</sup> It has been held that the following cases presented separable controversies and consequently could be removed: A suit for a conveyance of an undivided interest in lands held by a corporation together with an accounting by such corporation of a similar proportion of the proceeds of lands by it sold, and also for an accounting by individual defendants for the proceeds of the sale of lands acquired under the same title and sold by them before title was acquired by the defendant corporation. *Barney v. Latham*, 103 U. S. 205. A suit to establish an indebtedness against an insolvent corporation and for judgment against a second defendant which had assumed the indebtedness of the first corporation. *Mecke v. Valleytown M. Co. (C. C. A.)*, 93 Fed. R. 697; but see *Lewis v. Weidenfeld*, 76 Fed. R. 145. A statutory proceeding to recover the possession of land, *Stanbrough v. Cook*, 38 Fed. R. 369; or to quiet title, *Bacon v. Felt*, 38 Fed. R. 870; *Bates v. Carpentier*, 98 Fed. R. 452; but see *Little v. Giles*, 118 U. S. 596; or to condemn property for public use, even where the bill alleged that all of the defendants made some claim under a certain deed, when it did not limit the controversy to the validity of such deed, *Bacon v. Felt*, 38 Fed. R. 570; *Pacific R. R. Removal Cases*, 115 U. S. 223; *N. Y., N. H. & H. Co. v. Cockcroft*, 46 Fed. R. 881; *N. Pac. T. Co. v. Lowenberg*, 18 Fed. R. 339; *Chicago v. Hutchinson*, 15 Fed. R. 129; *Sugar Creek P. B. & P. C. R. Co. v. McKell*, 75 Fed. R. 34; where the defendants claimed under different titles and did not set up a joint defense. A suit to rescind a subscription to stock of an insolvent railroad

company seeking a return of the consideration advanced by the subscriber and a declaration that the plaintiff was entitled to a first lien upon the railroad, which had been bought by another company, to which suit a party that had subsequently begun proceedings to foreclose a lien claimed for the construction of the railroad had been made a defendant. *Foster v. Chesapeake & M. Ry. Co.*, 47 Fed. R. 369. But see *Fidelity L. Tr. & S. D. Co. v. Huntington*, 117 U. S. 280; *In re San Antonio & A. P. Ry. Co.*, 44 Fed. R. 145; *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. R. 4. A suit by a second chattel mortgagee asking for a specific attachment, which was issued against the goods, and that his mortgage be declared paramount to the first mortgage in which the mortgagor and the first mortgagee were defendants. *Capital City Bank v. Hodgin*, 22 Fed. R. 209. *Contra*, *Fidelity L. Tr. & S. D. Co. v. Huntington*, 117 U. S. 280; *Marsh v. Atlanta & F. R. Co.*, 53 Fed. R. 168; *Thurber v. Miller (C. C. A.)*, 67 Fed. R. 371; *Maher v. Tower Hotel Co.*, 94 Fed. R. 225; *Bissell v. Canada & St. L. Ry. Co.*, 39 Fed. R. 225; *Sharon v. Tucker*, 144 U. S. 533; *Turnbull Wagon Co. v. Linthicum C. Co.*, 80 Fed. R. 4; *Oakes v. Yonah L. & Min. Co.*, 89 Fed. R. 243. A suit to enforce a right of subrogation to several policies of fire insurance and to collect losses upon them resulting from the same fire. *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.*, 50 Fed. R. 243. A suit to recover the possession of town bonds when the party in possession disclaimed all interest in them except a lien for storage and counsel fees, while one of the depos-

sented wholly between citizens of different States, which can be fully determined without the presence of the other parties

itors of the bonds and the township disputed the right of the plaintiff to possession and claimed that the bonds were void. *Wilson v. Union Sav. Ass'n*, 30 Fed. R. 521. A suit to set aside a franchise against the assignee of the same and his mortgagee; where the mortgagee claimed that the plaintiff was estopped by its representation when the mortgage was executed that the franchise was valid. *Galesburg v. Galesburg Water Co.*, 27 Fed. R. 321. A suit by a mortgagor to remove one of the trustees under the mortgage and to restrain it from foreclosing the same against the wishes of the other trustee and of a majority of the bondholders. *Lake St. El. R. Co. v. Farmers' L. & Tr. Co.*, 72 Fed. R. 804. A suit by a receiver to enforce the statutory liability of stockholders for the debts of a corporation. *Calderhead v. Downing*, 108 Fed. R. 27. A suit to enjoin the sale of land by a defendant claiming title to part of the same under a deed of trust to secure the payment of certain promissory notes, in which the title of the trustee defendant depended upon the question whether the notes had been paid, and two of the other defendants, each of whom claimed an interest in the land hostile to each other, depending upon the question whether these notes were paid. *Snow v. Smith*, 4 Hughes, 204; s. c., 88 Fed. R. 657. A suit for separate accountings by different defendants who were not jointly liable. *Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co.*, 24 Fed. R. 516. A suit for a joint and several accounting by trustees for the fraudulent misappropriation of trust funds. *Boyd v. Gill*, 19 Fed. R. 145; *Langdon v. Fogg*, 18 Fed. R. 9. *Contra*, *Fox v. Mackay*, 60 Fed. R. 4. See also *Vinal v. Continental C. & I. Co.*, 34 Fed. R. 228. But see *Golden v.*

*Bruning*, 72 Fed. R. 2; and citations *infra*, notes 11, 12, 13, 14. A suit to cancel a promissory note brought against the owner and his indorsee for collection. *N. Y. Construction Co. v. Simon*, 53 Fed. R. 1. See also *Jackson S. S. Co. v. Pearson*, 60 Fed. R. 113.

For cases where it has been held that there was no separable controversy, see *Hyde v. Ruble*, 104 U. S. 407, 409; *Fraser v. Jennison*, 106 U. S. 191, 194; *Ayres v. Wiswall*, 112 U. S. 187, 192; *Des Moines N. Co. v. Iowa H. Co.*, 123 U. S. 552; *Boyd v. Gill*, 19 Fed. R. 145; *Vinal v. Continental C. & I. Co.*, 34 Fed. R. 228; *Wabash, St. L. & P. Ry. Co. v. Central Tr. Co.*, 23 Fed. R. 513; *County Court of Taylor County v. Balto. & O. R. Co.*, 35 Fed. R. 161; *Sexton v. Seelye*, 39 Fed. R. 705; *Anderson v. Bowers*, 40 Fed. R. 708; *Ames v. Chicago, S. F. & C. Ry. Co.*, 39 Fed. R. 581; *Bissel v. Canada & St. L. Ry. Co.*, 39 Fed. R. 225; *Western Union Tel. Co. v. Brown*, 32 Fed. R. 337; *Reineman v. Ball*, 33 Fed. R. 692; *Stanbrough v. Cook*, 38 Fed. R. 369; *Weller v. J. B. Pace T. Co.*, 32 Fed. R. 860; *In re San Antonio & A. P. Ry. Co.*, 44 Fed. R. 145; *Yearian v. Horner*, 36 Fed. R. 180; *Shainwald v. Lewis*, 108 U. S. 158; *Woodrum v. Clay*, 63 Fed. R. 897; *Stone v. South Carolina*, 117 U. S. 430; *Anderson v. Appleton*, 32 Fed. R. 855; *Rogers v. Van Nortwick*, 45 Fed. R. 513; *Peper v. Fordyce*, 119 U. S. 479; *Laidly v. Huntington*, 121 U. S. 179; *Vinal v. Continental C. & I. Co.*, 35 Fed. R. 673; s. c., 136 U. S. 653; *May v. St. John*, 38 Fed. R. 770; *Winchester v. Loud*, 108 U. S. 130; *Rand v. Walker*, 117 U. S. 340; *Reed v. Reed*, 31 Fed. R. 49; *Kaitel v. Wylie*, 38 Fed. R. 865; *Fletcher v. Hamlet*, 116 U. S. 408; *St. Louis & S. F. Ry. Co. v. Wilson*, 114 U. S. 60; *Hax v. Caspar*, 31 Fed. R.

to the suit.<sup>2</sup> It has been held that an intervenor may thus remove a cause.<sup>3</sup> "Whatever might be the rule if an intervenor presented some new and independent interest or question, when he simply comes in to carry on the litigation over the same issues and questions he acquires no right of removal different from that possessed by him who had been carrying on the litigation as his representative."<sup>4</sup> It seems, that one who intervenes for the purpose of asserting a lien prior to that of the original plaintiff, occupies the attitude of an intervening plaintiff, and cannot remove the case on the ground that there is a separate controversy between him and the original plaintiff.<sup>5</sup> It has been held that a case cannot be removed by an intervenor who has been allowed to come in solely because he has indemnified the original defendant;<sup>6</sup> nor by a person who has been denied permission to intervene.<sup>7</sup> A single condemnation proceeding affecting distinct lots of land owned by several persons presents several distinct controversies, any one of which in a proper case may be removed to a Federal court independently of the rest;<sup>8</sup> but one of two respondents to such

499; *Sloane v. Anderson*, 117 U. S. 275; *Fidelity Ins., Tr. & S. D. Co. v. Huntington*, 117 U. S. 280; *Plymouth G. M. Co. v. Amador & S. Canal Co.*, 118 U. S. 264; *Louisville & N. R. Co. v. Wangelin*, 182 U. S. 599; *Brown v. Trousdale*, 188 U. S. 389; *Dow v. Bradstreet Co.*, 46 Fed. R. 824; *McNulty v. Conn. Mut. L. Ins. Co.*, 46 Fed. R. 805; *Southworth v. Reid*, 86 Fed. R. 451; *Wilder v. Virginia T. & C. S. & I. Co.*, 46 Fed. R. 676; *Sweeney v. Grand L. & W. C. R. Co.*, 61 Fed. R. 8; *Fox v. Mackay*, 60 Fed. R. 4; *Wilson v. Oswego Tp.*, 151 U. S. 56; *Torrence v. Shedd*, 144 U. S. 527; *Wilson v. Oswego Tp.*, 151 U. S. 56; *Barth v. Coler*, 60 Fed. R. 466; *In re Foley*, 80 Fed. R. 949; *Turnbull Wagon Co. v. Linthicum Wagon Co.*, 80 Fed. R. 4; *Mutual Reserve Fund Life Ass'n v. Farmer*, 77 Fed. R. 929; *Watson v. Asbury Pk. & B. St. Ry. Co.*, 78 Fed. R. 1; *Security Co. v. Pratt*, 64 Fed. R. 405; *Davis v. County Court of Randolph County*, 88 Fed. R. 705; *Rust v. Brinte Silver*

*Co.*, 58 Fed. R. 611; *Burgunder v. Brown*, 59 Fed. R. 497; *Colburn v. Hill (C. C. A.)*, 101 Fed. R. 500; *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. R. 507, and cases cited in this section, *infra*.

<sup>2</sup> *Fraser v. Jennison*, 106 U. S. 191, 194; *Ayres v. Wiswall*, 112 U. S. 187, 192. But see *Speer on Removal of Causes*, §§ 28-31.

<sup>3</sup> *Hack v. Chicago & G. S. Ry. Co.*, 23 Fed. R. 356; *Jackson & S. Co. v. Pearson*, 60 Fed. R. 118.

<sup>4</sup> *Brewer, J.*, in *Hakes v. Burns*, 40 Fed. R. 83, 84.

<sup>5</sup> *In re San Antonio & A. P. Ry. Co.*, 44 Fed. R. 145.

<sup>6</sup> *Olds Wagon Works v. Benedict*, 67 Fed. R. 1.

<sup>7</sup> *Bertha Z. & M. Co. v. Carico*, 61 Fed. R. 182.

<sup>8</sup> *Pacific R. R. Removal Cases*, 115 U. S. 2, 23, 19 Fed. R. 150. But see *In re Jarnecke Ditch*, 69 Fed. R. 161; *In re Chicago*, 64 Fed. R. 897.

a proceeding, who hold different interests in the same lot, cannot remove the case, since there is no separate controversy as regards them;<sup>9</sup> and a party who has leased the property to another party for the term of ninety-nine years is also indispensable to the controversy between his lessee and the person who institutes the condemnation proceeding; even, it has been held, although the lessor files a disclaimer.<sup>10</sup>

“For the purpose of determining whether a controversy is separable, the allegations in the bill must be taken as true.”<sup>11</sup> A controversy is not separable when a defendant, who would otherwise be entitled to remove the suit, is charged as jointly liable with another defendant, who is a fellow-citizen of the plaintiff.<sup>12</sup> Such a case cannot be removed by a defendant whose citizenship is different from that of the plaintiff, even if the alleged cause of action is both joint and several, whether in tort or contract, if the plaintiff has sued the defendants jointly; although a State statute permits judgment to be entered for or against one or more of the plaintiffs, and for or against one or more of the defendants.<sup>13</sup> Where the plaintiff has

<sup>9</sup> *Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117; *Seattle & M. Ry. Co. v. State*, 52 Fed. R. 594; *Washington v. Columbus & C. M. R. Co.*, 53 Fed. R. 678.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Wilder v. Virginia T. & C. S. & I. Co.*, 46 Fed. R. 676, 682, per Fuller, C. J.

<sup>12</sup> *Hyde v. Ruble*, 104 U. S. 407; *Ayres v. Wiswall*, 112 U. S. 187, 193; *Louisville & N. R. Co. v. Ide*, 114 U. S. 52; *Putnam v. Ingraham*, 114 U. S. 57; *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60; *Pirie v. Tvedt*, 115 U. S. 41; *Starin v. New York*, 115 U. S. 248; *Sloane v. Anderson*, 117 U. S. 275; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280; *Core v. Vinal*, 117 U. S. 347; *Plymouth M. Co. v. Amador C. Co.*, 118 U. S. 264; *Little v. Giles*, 118 U. S. 596; *Brooks v. Clark*, 119 U. S. 502.

<sup>13</sup> *Louisville & N. R. Co. v. Ide*, 114 U. S. 52; *St. Louis & S. F. R. Co. v.*

*Wilson*, 114 U. S. 60; *Pirie v. Tvedt*, 115 U. S. 42; *Starin v. New York*, 115 U. S. 248; *Plymouth Mfg. Co. v. Amador C. Co.*, 118 U. S. 264; *Little v. Giles*, 118 U. S. 596; *Brooks v. Clark*, 119 U. S. 502; *Weller v. J. B. Pace T. Co.*, 32 Fed. R. 860; *Anderson v. Appleton*, 32 Fed. R. 855; *Wilson v. Union Saving Ass'n*, 30 Fed. R. 521; *Shaver v. Hardin*, 30 Fed. R. 801; *Boyd v. Gill*, 19 Fed. R. 145. But see *Stanbrough v. Cook*, 38 Fed. R. 369; *Spangler v. Atchison, T. & S. F. R. Co.*, 42 Fed. R. 305; *Moore v. Los Angeles S. S. Co.*, 89 Fed. R. 73; *Graves v. Corbin*, 132 U. S. 571. A separate controversy is not presented “because complainants might have severally prosecuted a suit which they have jointly brought, nor can a defendant say that an action shall be general which a plaintiff elects to make joint.” *Wilder v. Virginia T. & C. S. & I. Co.*, 46 Fed. R. 676, 682, per Fuller, C. J.

sued a master and servant,<sup>14</sup> or a corporation and its receivers<sup>15</sup> jointly for the same tort, there is no separable controversy. Nor if the defendants have filed separate answers containing separate defenses.<sup>16</sup> Nor if one of them has made a default.<sup>17</sup> Nor if one of them has appeared and disclaimed.<sup>18</sup> Nor if judgment has been entered against one of them before the other was served with process.<sup>19</sup> Nor if one has not been served, and has not appeared when the other seeks to remove the cause,<sup>20</sup> except in the case of defendants described in the plaintiff's pleading as unknown.<sup>21</sup> A case is not removable because a colorable assignment has been made to give a State court exclusive jurisdiction.<sup>22</sup> If it is claimed that some of the defendants were improperly made parties for the sake of preventing a removal, that fact must be clearly proved to the Circuit Court by the petitioner,<sup>23</sup> and then it has been held at circuit that it may justify a removal, since there is but one controversy and that is wholly between citizens of different States.<sup>24</sup> It has been held that the right to a removal on the ground of a separable controversy is given to any

<sup>14</sup> *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131; *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92.

<sup>15</sup> *Whitcomb v. Smithson*, 175 U. S. 635; *Moore v. Los Angeles L. & S. Co.*, 89 Fed. R. 73. An earlier decision of a Circuit Court held that in such an action against a lessor and lessee, there was a separable controversy. *Spangler v. Atchison, T. & S. F. R. Co.*, 42 Fed. R. 305.

<sup>16</sup> *Pirie v. Tvedt*, 115 U. S. 41; *Sloane v. Anderson*, 117 U. S. 275, 278; *Starin v. New York*, 115 U. S. 248; *Hax v. Caspar*, 31 Fed. R. 499; *Thurber v. Miller (C. C. A.)*, 67 Fed. R. 371.

<sup>17</sup> *Putnam v. Ingraham*, 114 U. S. 57; *Brooks v. Clark*, 119 U. S. 502.

<sup>18</sup> *Hax v. Caspar*, 31 Fed. R. 499; *Goodnow v. Litchfield*, 47 Fed. R. 753; *Dow v. Bradstreet Co.*, 46 Fed. R. 824.

<sup>19</sup> *Brooks v. Clark*, 119 U. S. 502.

<sup>20</sup> *Ames v. Chicago, S. F. & C. Ry. Co.*, 39 Fed. R. 881; *Patchin v. Hunter*, 38 Fed. R. 51.

<sup>21</sup> *Walker v. Richards*, 55 Fed. R. 129.

<sup>22</sup> *Waite, C. J.*, in *Leather Mfrs. Bank v. Cooper*, 120 U. S. 778, 781. *Contra*, *Goodnow v. Litchfield*, 47 Fed. R. 753. See *Dow v. Bradstreet Co.*, 46 Fed. R. 824.

<sup>23</sup> *Plymouth M. Co. v. Amador C. Co.*, 118 U. S. 264, 270; *Leather Mfrs. Bank v. Cooper*, 120 U. S. 778, 781; *Landers v. Felton*, 78 Fed. R. 311; *Hukill v. Maysville & B. S. R. Co.*, 72 Fed. R. 745; *Warax v. Cincinnati, N. O. & T. P. Ry. Co.*, 72 Fed. R. 637.

<sup>24</sup> *Collins v. Wellington*, 31 Fed. R. 244; *Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 44 Fed. R. 456; *Diday v. N. Y., P. & O. R. Co.*, 107 Fed. R. 565. See *Hax v. Caspar*, 31 Fed. R. 499, 501; *Nelson v. Hennessey*, 33 Fed. R. 113; *Shepherd v. Bradstreet Co.*, 65 Fed. R. 142; *Rivers v. Bradley*, 53 Fed. R. 305; *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. R. 165; *Over v. L. E. & W. R. Co.*, 63 Fed. R. 34.



one or more of the defendants interested in the controversy irrespective of their citizenship;<sup>25</sup> but only to the non-resident defendants interested in the controversy,<sup>26</sup> not to the plaintiff;<sup>27</sup> nor to a resident defendant;<sup>28</sup> that an alien cannot remove a suit because of a separable controversy therein,<sup>29</sup> and that where an alien is plaintiff, one of several defendants cannot remove a case upon this ground;<sup>30</sup> that after a removal on the ground of a separable controversy the plaintiff may discontinue as to the defendant who removed the suit, and then move to remand;<sup>31</sup> but that his motion to remand will not be granted if the record still shows a controversy between citizens of different States.<sup>32</sup> The removal takes the entire suit, not merely the separate controversy, into the Federal court.<sup>33</sup>

Section 737 of the Revised Statutes does not affect the removal of causes.<sup>34</sup>

§ 385. Practice on removal in general.—The method of removing civil causes from State courts to Circuit Courts of the United States, on grounds other than prejudice or local influence, or in controversies between citizens of the same State claiming land under grants of different States, or in cases arising under the Civil Rights laws, which three classes of cases have a practice of their own hereafter described, is as follows: The defendant must file in the State court, at or before the time when he is obliged to answer or plead to the declaration or complaint, a petition for the removal of the cause from the State court to the Circuit Court held in the district where the suit is pending; that is, the district where the suit is pending at the time of the removal, although the suit may have been

<sup>25</sup> *Stanbrough v. Cook*, 38 Fed. R. 369.

<sup>26</sup> *Rand v. Walker*, 117 U. S. 340; *Western Union Tel. Co. v. Brown*, 32 Fed. R. 337.

<sup>27</sup> *Western Union Tel. Co. v. Brown*, 32 Fed. R. 337.

<sup>28</sup> *Thurber v. Miller* (C. C. A.), 67 Fed. R. 371.

<sup>29</sup> *Woodrum v. Clay*, 33 Fed. R. 897; *Ins. Co. of N. A. v. Delaware Mut. Ins. Co.*, 50 Fed. R. 243; *King v. Cornell*, 106 U. S. 395; *Merchants' C. P. &*

*S. Co. v. Insurance Co. of N. A.*, 151 U. S. 368, 386.

<sup>30</sup> *Creagh v. Equitable Life Assur. Soc.*, 38 Fed. R. 1.

<sup>31</sup> *Texas Trans. Co. v. Seeligson*, 122 U. S. 519. See also *Perry v. Clift*, 32 Fed. R. 801; *Iowa H. Co. v. Des Moines N. & R. Co.*, 8 Fed. R. 97, cited *infra*, § 391.

<sup>32</sup> *Bacon v. Felt*, 38 Fed. R. 870.

<sup>33</sup> *Barney v. Latham*, 103 U. S. 205.

<sup>34</sup> *Patchin v. Hunter*, 38 Fed. R. 51. See *supra*, § 50.



originally brought in another district.<sup>1</sup> He must file therewith a bond, with a good and sufficient surety, for his entering in the Circuit Court, at the first day of its next session, a copy of the record in the suit, and for paying all costs that may be awarded in the Circuit Court, if that court shall hold that the suit was improperly removed; and also for appearing and entering special bail in the suit, if special bail was originally requisite therein. It is then the duty of the State court to accept the petition and bond, if correct in form, and to proceed no further in the suit. When the copy of the record is subsequently filed in time, the cause proceeds in the Circuit Court in the same manner as if originally commenced there.<sup>2</sup>

§ 385a. **Petition for removal.**—The petition must state the facts which warrant the removal and give the Circuit Court jurisdiction; namely, in ordinary cases, that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000; that the matter in dispute arises under the Constitution and laws of the United States, or that there is a controversy between citizens of different States, or a controversy between citizens of a State and foreign States, citizens or subjects.<sup>1</sup> These facts should be stated positively, not on information and belief,<sup>2</sup> and specifically.<sup>3</sup> A general allegation in the language of the statute is insufficient.<sup>4</sup> When the right to remove rests upon a difference in citizenship, the citizenship and residence of each of the parties should be alleged.<sup>5</sup> It is in-

§ 385. <sup>1</sup> *Hess v. Reynolds*, 118 U. S. 78, 81.

<sup>2</sup> 18 St. at L. 470, as amended, 24 St. at L. 552.

§ 385a. <sup>1</sup> *Railway Co. v. Ramsey*, 22 Wall. 322, 328; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278.

<sup>2</sup> *Wolff v. Archibald*, 14 Fed. R. 869.

<sup>3</sup> *Gold W. & W. Co. v. Keyes*, 96 U. S. 199; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278. But see *Hoge v. Canton Ins. Office*, 108 Fed. R. 518.

<sup>4</sup> *Gold W. & W. Co. v. Keyes*, 96 U. S. 199; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278; *Carson v. Dunham*, 121 U. S. 421.

<sup>5</sup> *Grace v. Am. C. Ins. Co.*, 109 U. S. 278. See *supra*, §§ 19, 66. It was held to be insufficient to allege "that

said plaintiffs as such executors are citizens of the State of New York." *Amory v. Amory*, 95 U. S. 186. But see *Cooke v. Seligman*, 7 Fed. R. 268. And in a petition in the name of a firm, that the members of the firm, without naming them individually, are citizens of a certain State. *Adams v. May*, 27 Fed. R. 907. It has been held that a suit against a copartnership sued in its firm name cannot be removed on the ground of diverse citizenship. *Ralya Market Co. v. Armour & Co.*, 102 Fed. R. 580. *Cf. supra*, §§ 18, 19. The allegation that a defendant is "a company duly chartered and incorporated under the laws of Great Britain" is a sufficient statement of the citizenship of such

sufficient to state their residence alone.<sup>6</sup> The non-residence of the defendant should be stated when he removes on the ground of a difference of citizenship.<sup>7</sup> The petition should show that the difference in citizenship and the non-residence of the defendant existed both at the time of the commencement of the suit and at the time of the application for removal.<sup>8</sup> If, however, either or both of those facts are alleged with sufficient precision in the pleadings, served or filed previously or concurrently with the petition, they need not be restated in it.<sup>9</sup> It is the safer practice to allege in the petition the residence of the defendant who seeks a removal on the ground of a difference of citizenship, even when such defendant is a foreign corporation.<sup>10</sup> A conditional application for a removal, for example, an application for a removal in case a pending mo-

corporation for the purposes of removal to a Federal court. *Robertson v. Scottish U. & Nat. Ins. Co.*, 68 Fed. R. 173; *Shattuck v. No. Br. & Mer. Ins. Co.*, 58 Fed. R. 609; *Continental W. P. Co. v. Lewis Voight & Sons*, 106 Fed. R. 550. Where a party is a corporation, the petition should not allege merely that it is, and at the time of the commencement of the suit was, a citizen of a specified State, but also that it is, and at the time of the commencement of the action was, a corporation created by or under the laws of that State. *Loneragan v. Illinois Cent. R. Co.*, 55 Fed. R. 550; *Frisbie v. Chesapeake & O. Ry. Co.*, 57 Fed. R. 1; *De Loy v. Travelers' Ins. Co.*, 59 Fed. R. 819.

<sup>6</sup> *Grace v. Am. C. Ins. Co.*, 109 U. S. 278; *Grand Trunk Ry. Co. v. Twitchell* (C. C. A.), 59 Fed. R. 727. But see *Chambers v. McDougal*, 42 Fed. R. 694.

<sup>7</sup> *Freeman v. Butler*, 39 Fed. R. 1; *Camprelle v. Balbach*, 46 Fed. R. 81; *Fife v. Whittell*, 102 Fed. R. 537.

<sup>8</sup> *Gibson v. Bruce*, 108 U. S. 561; *H. & T. R. Co. v. Shirley*, 111 U. S. 358; *Akers v. Akers*, 117 U. S. 197; *Stevens v. Nichols*, 130 U. S. 280; *Jackson v. Allen*, 132 U. S. 27; *Camprelle v. Balbach*, 46 Fed. R. 81; *Laskey v. Newtown Min. Co.*, 56 Fed. R. 628;

*Foster v. Paragould S. E. R. Co.*, 74 Fed. R. 273.

<sup>9</sup> *Bondurant v. Watson*, 103 U. S. 281, 285; *Steamship Co. v. Tugman*, 106 U. S. 118. Where the complaint stated that, at certain dates therein mentioned, which were before the commencement of the action, the diversity of citizenship existed, and the petition for the removal stated that the diversity then existed, it was held that the case must be remanded since it did not sufficiently appear that the diversity existed at the time of the commencement of the action. *Craswell v. Belanger*, 56 Fed. R. 529. Where the petition alleged that the defendant was a foreign corporation, it was held to be unnecessary to allege that it was such when the suit was commenced. *Roberts v. Pac. & A. Ry. & Nav. Co.*, 104 Fed. R. 577, 579. Defects in a petition may be supplied by subsequent allegations in the record or proof in the evidence. *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. R. 727.

<sup>10</sup> *Hirschl v. J. L. Case T. Mach. Co.*, 42 Fed. R. 803, per Miller, J. But see *Myers v. Murray, Nelson & Co.*, 48 Fed. R. 695; *Howard v. Gold Reefs of Ga.*, 102 Fed. R. 657; *Shattuck v. Nor. Br. & Merc. Ins. Co.*,

tion should not be allowed, or in case a plea in abatement is not sustained, is ineffectual.<sup>11</sup>

Where a removal is claimed upon the ground that the suit arises under the Constitution and laws of the United States, the petition must state the facts showing that such is the case, unless those facts appear in pleadings previously filed or served, when such allegations may be incorporated into the petition by reference.<sup>12</sup> If from the questions involved in the case it appears "that some title, right, privilege, or immunity on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, or sustained by an opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term;" otherwise not.<sup>13</sup> Where the plaintiff's pleading does not show that the case arises under the Constitution or laws of the United States, a defense resting upon that Constitution or those laws, set up in defendant's answer, does not give him the right of removal.<sup>14</sup> His remedy in this respect is only by writ of error from the Supreme Court.<sup>15</sup> But where the defendant is a corporation created by an act of Congress, the case may be removed, provided that the matter in dispute exceeds the jurisdictional amount; although the plaintiff's pleading does not show where the defendant's charter was obtained.<sup>16</sup>

The petition should also show that the matter in dispute is the jurisdictional amount, unless this already appears from the

58 Fed. R. 609; *Roberts v. Pac. & A. Ry. & Nav. Co.*, 104 Fed. R. 577.

<sup>11</sup> *Manning v. Amy*, 140 U. S. 137.

<sup>12</sup> *Gold W. & W. Co. v. Keyes*, 98 U. S. 199, 204; *Trafton v. Nougues*, 4 Sawyer, 178; *Carson v. Dunham*, 121 U. S. 421; *supra*, § 17. "The right of removal does not depend upon the validity of the claim set up under the Constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit." *So. Pac. R. Co. v. California*, 118 U. S. 109, 112, per Waite, C. J. But see *Kentucky v. Louisville B. Co.*, 42 Fed. R. 241, 247; *Starin v. New York*, 115 U. S. 248; *Iowa v. Chicago*,

*M. & St. P. Ry. Co.*, 83 Fed. R. 391; *Austin v. Gagan*, 89 Fed. R. 626. As to suits against receivers, see *Evans v. Dillingham*, 43 Fed. R. 177; and *supra*, § 17.

<sup>13</sup> *Starin v. New York*, 115 U. S. 248, 257, per Waite, C. J.; *So. Pac. R. Co. v. California*, 118 U. S. 109, 112; *supra*, § 17.

<sup>14</sup> *Tennessee v. Union & Planters' Bank*, 152 U. S. 454. Cf. *Am. S. L. B. Co. v. Empire S. N. Co.*, 47 Fed. R. 741.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Supreme Lodge K. of P. v. Wilson*, 66 Fed. R. 785. See *Winters v. Drake*, 102 Fed. R. 545.

pleadings.<sup>17</sup> A naked allegation in the petition for the removal that the value of the matter in dispute exclusive of interest and costs exceeded two thousand dollars, was held sufficient in a case where the pleadings did not show the value of the matter in dispute, nor state any facts from which such value could be ascertained.<sup>18</sup> In a case where the pleadings showed that no interest was demanded or could be recovered, it was held that a petition was not defective which stated, without reference to any interest, that the value of the matter in dispute exclusive of costs exceeded two thousand dollars.<sup>19</sup> In a suit in equity to set aside several distinct judgments, the aggregate amount of the judgments constitutes the value of the matter in dispute.<sup>20</sup> In determining the value of the matter in dispute on a removal, a counter-claim set up in the answer,<sup>21</sup> or a cross-bill,<sup>22</sup> if the matters pleaded in the counter-claim or cross-bill are directly connected with the subject-matter of the declaration or original bill, may perhaps be considered. Where it is claimed that before the petition for a removal was presented to the State court, the declaration was amended so as to reduce the value of the matter in dispute below two thousand dollars, the question whether the amendment was prior

<sup>17</sup> *U. S. v. Pratt C. & C. Co.*, 18 Fed. R. 708; *Chambers v. McDougal*, 42 Fed. R. 694; *Baltimore v. Postal Tel. Co.*, 62 Fed. R. 500; *supra*, § 16; *Egan v. Chicago, M. & St. P. Ry. Co.*, 53 Fed. R. 675; *Holt v. Bergwin*, 60 Fed. R. 1; *Tod v. Cleveland & M. V. Ry. Co. (C. C. A.)*, 65 Fed. R. 145; *supra*, §§ 16, 293. It has been held that where the value of the matter in dispute is less than \$2,000, a suit arising under the revenue laws cannot be removed, although the Federal court might have had original jurisdiction of the same irrespective of the amount involved. *Johnson v. Wells, Fargo & Co.*, 91 Fed. R. 1. But see *Crawford v. Hubbell*, 89 Fed. R. 1.

<sup>18</sup> *Langdon v. Hillside C. & I. Co.*, 41 Fed. R. 609. See also *Platt v. Phoenix Assur. Co. of London*, 37 Fed. R. 730. But see *Bowman v.*

*Bowman*, 80 Fed. R. 849, which seems to hold that when the value of the subject-matter is uncertain no removal can be had; and which should be compared with *Sharon v. Terry*, 36 Fed. R. 337. As to estoppel, see *La Page v. Day*, 74 Fed. R. 977; *Henderson v. Cabell*, 43 Fed. R. 257; *supra*, § 16.

<sup>19</sup> *Weber v. Travelers' Ins. Co.*, 45 Fed. R. 657.

<sup>20</sup> *Marshall v. Holmes*, 141 U. S. 589.

<sup>21</sup> *Dushane v. Benedict*, 120 U. S. 630; *Carson & R. L. Co. v. Holtzclaw*, 30 Fed. R. 578; *Block v. Darling*, 140 U. S. 234. But see *Bennett v. Devine*, 45 Fed. R. 705; *Burke v. Bunker Hill & S. Min. & C. Co.*, 46 Fed. R. 644; *N. Y. I. & P. Co. v. Milburn G. & M. Co.*, 35 Fed. R. 225.

<sup>22</sup> *Lovell v. Cragin*, 136 U. S. 180, 141; *Wolcott v. Sprague*, 55 Fed. R. 545.

in time to the removal must be determined by the Federal court.<sup>23</sup> The petition need not be verified,<sup>24</sup> but it is the better practice to have it verified.<sup>25</sup> It may be signed either by the petitioner or by his attorney in fact or at law.<sup>26</sup> Where the petition is actually left in the clerk's office, an omission of the file-mark does not invalidate the removal.<sup>27</sup>

**§ 385b. Bond on removal.**—The bond should name a specific sum as the penalty, but the omission of any penalty was held not to be a ground for a remand.<sup>1</sup> A penalty of \$500 has been held sufficient when the defendant has not been held to bail.<sup>2</sup> There seems to be no reason why a penalty of \$100 should not be sufficient in such a case, since the costs in case of a remand rarely equal that amount.<sup>3</sup> If the condition is simply that the petitioner will file "copies of all process," it is insufficient.<sup>4</sup> The following condition was held to be sufficient: "If the said petitioners shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and do or cause to be done such other and appropriate acts as, by the acts of Congress approved March 3, 1875, and other acts of Congress, are required to be done upon the removal of a suit into the United States Circuit Court from a State court."<sup>5</sup> When special bail was not originally required in the action, the bond need contain no condition for the entry of such bail in the Federal court.<sup>6</sup> Nor need

<sup>23</sup> *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.

<sup>24</sup> *Sweeney v. Coffin*, 1 Dill. 73; *Allen v. Ryerson*, 2 Dill. 501; *Houser v. Clayton*, 8 Woods, 278; *Howard v. Gold Reefs of Ga.*, 102 Fed. R. 657. See *Removal Cases*, 100 U. S. 457, 471.

<sup>25</sup> *Kansas City, F. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 308.

<sup>26</sup> *Dennis v. Alachua County*, 8 Woods, 683; *Wormser v. Dahlman*, 16 Blatchf. 319. See also *Removal Cases*, 100 U. S. 457, where there is a dictum that objections as to the form of the signature are waived unless raised in the State court.

<sup>27</sup> *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.

§ 385b. <sup>1</sup> *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. R. 616. Where the place for the amount of the penalty was left blank, the bond was held to be insufficient. *Burdick v. Hale*, 7 Biss. 96; *Austin v. Gagan*, 39 Fed. R. 626.

<sup>2</sup> *Kentucky v. Louisville B. Co.*, 42 Fed. R. 241. But see *Blanchard v. Dwight*, 12 Wend. (N. Y.) 192.

<sup>3</sup> See *Josslyn v. Phillips*, 27 Fed. R. 481.

<sup>4</sup> *Burdick v. Hale*, 7 Biss. 96.

<sup>5</sup> *Cooke v. Seligman*, 7 Fed. R. 263.

<sup>6</sup> *Burck v. Taylor*, 30 Fed. R. 581.

the bond contain a condition for the entry of appearance in the Federal court in such a case.<sup>7</sup> The bond must provide for the payment of costs in case of a remand.<sup>8</sup> The bond need not be executed by the petitioner, if it have a principal and a sufficient surety.<sup>9</sup> When the petitioner is named as principal, it seems that it may be executed in his name by his attorney-at-law.<sup>10</sup> It seems that the bond must be sealed by the parties who execute it,<sup>11</sup> but that a scrawl seal without wax, or an impression on the paper, will be sufficient,<sup>12</sup> at least in a State by the law of which such scrawl or impression is equivalent to a seal. A formal defect in the bond may be cured by amendment, with leave of the court, or a new bond may be filed, if leave to do so be obtained.<sup>13</sup> It is customary to procure the approval of the bond by the State court. Whether the Federal court has the power to approve the bond after the State court has disapproved it, or to disapprove it after the State court's approval, is unsettled.<sup>14</sup> It has been held that the want of acknowledgment or of proof of the execution of the bond is a matter of practice for the State court to pass upon, and that it will not be reviewed by the Federal court after the State court has accepted the bond.<sup>15</sup> Such an objection cannot be raised for the first time in the Supreme Court.<sup>16</sup> It has been held

<sup>7</sup> *Ibid.*

<sup>8</sup> *Sheldrick v. Cockcroft*, 27 Fed. R. 579; *Webber v. Bishop*, 13 Fed. R. 49; *Torrey v. Grant L. Works*, 14 Blatchf. 269. But see *Dennis v. County of Alachua*, 3 Woods, 683, 688; *Deford v. Mehaffy*, 13 Fed. R. 481, and § 373.

<sup>9</sup> *Stevens v. Richardson*, 20 Blatchf. 53; s. c., 9 Fed. R. 191; *Public G. & S. Exch. v. W. U. Tel. Co.*, 16 Fed. R. 289; s. c., 11 Biss. 568; *People's Bank of Greenville v. Aetna Ins. Co.*, 58 Fed. R. 161.

<sup>10</sup> *Dennis v. County of Alachua*, 3 Woods, 683, 687.

<sup>11</sup> *U. S. v. Linn*, 15 Pet. 290; *Speer on Removal of Causes*, p. 119.

<sup>12</sup> *U. S. v. Stephenson*, 1 McLean, 462; *Speer on Removal of Causes*, p. 119.

<sup>13</sup> *Dennis v. County of Alachua*, 3 Woods, 683, 688; *Ayers v. Watson*,

113 U. S. 594, 598; *Coburn v. Cedar V. L. & C. Co.*, 25 Fed. R. 791. See *infra*, § 385d, notes 13, 14, 15; and § 391, notes 39, 40, 41.

<sup>14</sup> Compare *Osgood v. Chicago, D. & V. R. Co.*, 6 Biss. 330; *Dennis v. County of Alachua*, 3 Woods, 683; *Cooke v. Seligman*, 7 Fed. R. 263; *Fisk v. U. P. Ry. Co.*, 6 Blatchf. 362; *Taylor v. Shew*, 54 N. Y. 75; *Mix v. Andes Ins. Co.*, 74 N. Y. 53; *Stone v. South Carolina*, 117 U. S. 430; *Carson v. Dunham*, 121 U. S. 421; *Shedd v. Fuller*, 36 Fed. R. 609; *Wilson v. W. U. Tel. Co.*, 34 Fed. R. 561; *Chambers v. McDougal*, 43 Fed. R. 694; *Brown v. Murray, Nelson & Co.*, 43 Fed. R. 614.

<sup>15</sup> *Cooke v. Seligman*, 7 Fed. R. 263, 269, per Blatchford, J.

<sup>16</sup> *Removal Cases*, 100 U. S. 457.



that an omission from the bond of a statement of the residence of the surety, and of proof of his sufficiency and the fact that he is an attorney-at-law, who by a rule of the State court is disqualified to act as surety, are objections which can only be raised in the State court, and that the Federal court will not consider them.<sup>17</sup>

**§ 385c. Proceedings in State court on removal not dependent on prejudice or local influence.**—No order of the State court is essential to the removal.<sup>1</sup> An order of a State court denying the prayer of a petitioner for a removal has been held to be a breach of judicial comity.<sup>2</sup> An order of a State court granting the prayer for a removal, contained in a petition which sets forth the jurisdictional facts, should not be subsequently set aside by the court that made it.<sup>3</sup> It is the safer practice to present both the petition and the bond to the State court, not merely to file them in the clerk's office.<sup>4</sup> It has been said: "It is the State court which is authorized to act upon the petition, and not a judge or a clerk of the State court."<sup>5</sup> It has been held that when copies of the petition and bond are certified to the Federal court with the rest of the record, in the absence of evidence to the contrary it will be presumed that they were presented to and accepted by the State court.<sup>6</sup> The State court has no power to pass upon questions of fact in the proceedings for a removal.<sup>7</sup>

**§ 385d. Time of removal not dependent on prejudice or local influence.**—The petition for a removal and the bond

<sup>17</sup> *Probst v. Cowen*, 91 Fed. R. 929.  
 § 385c. <sup>1</sup> *Kern v. Huidekoper*, 103 U. S. 485; *Insurance Co. v. Dunn*, 19 Wall. 214.

<sup>2</sup> *Chambers v. McDougal*, 42 Fed. R. 694-696.

<sup>3</sup> *Chamberlain v. American Nat. L. Ins. Co.*, 11 Hun (N. Y.), 370.

<sup>4</sup> *Shedd v. Fuller*, 36 Fed. R. 600; *Roberts v. Chicago, St. P., M. & O. Ry. Co.*, 45 Fed. R. 433; *Fox v. Southern Ry. Co.*, 80 Fed. R. 945. *Contra*, *Noble v. Massachusetts Ben. Ass'n*, 48 Fed. R. 337; *Burck v. Taylor*, 39 Fed. R. 581; s. c., 152 U. S. 634; *Brown v. Murray, Nelson & Co.*, 43 Fed. R. 614, 616. See *La Page v. Day*,

74 Fed. R. 977. Where the petition was filed in the wrong court the case was remanded. The fact that the removal papers were not marked "filed" before they were presented to the State court is immaterial. *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.

<sup>5</sup> *Williams v. Massachusetts Ben. Ass'n*, 47 Fed. R. 533, 534, per Coxe, J.

<sup>6</sup> *Chattanooga R. & C. R. Co. v. Cincinnati, O. & T. P. Ry. Co.*, 44 Fed. R. 456; *Probst v. Cowen*, 91 Fed. R. 929.

<sup>7</sup> *Powers v. Ches. & O. Ry. Co.*, 65 Fed. R. 129; *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.



must be filed in cases where there is no prejudice or local influence at or before the time to plead or answer expires.<sup>1</sup> It seems that a case cannot be removed after the time to plead in abatement has expired, although the defendant has further time in which to plead or answer to the merits.<sup>2</sup> Such a removal cannot be made after the time to demur has expired, although a demurrer has been overruled with leave to answer;<sup>3</sup> nor after the time to plead has expired, although the defendant has the right to amend as of course within a specified time.<sup>4</sup> It is unsettled whether, if the defendant's time to plead or answer has been extended by consent or order, his time to remove is likewise extended.<sup>5</sup> The voluntary appear-

§ 385d. <sup>1</sup>25 St. at L. 433. It has been held that a defendant may remove the case before an attempt has been made to serve him with process. *Parkinson v. Barr*, 105 Fed. R. 81. But a corporation, not a party to the record, which had refused to enter itself as a defendant to the action, was not allowed to remove the case. *Bertha Z. & M. Co. v. Carico*, 61 Fed. R. 132.

<sup>2</sup>*Morton's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673; *First Littleton Bridge Corp. v. Con. R. L. Co.*, 71 Fed. R. 225. But see *Mahoney v. New Or. B. & L. Ass'n*, 70 Fed. R. 513; *Wilson v. Winchester & P. R. Co.*, 82 Fed. R. 15. As to the day before which a removal must be made in *Indiana*, see *McKeen v. Ives*, 35 Fed. R. 801; *Amsden v. Norwich V. F. Co.*, 44 Fed. R. 515. *Kansas*, *Burnham v. First Nat. Bank (C. C. A.)*, 53 Fed. R. 163. *Kentucky*, *Fidelity Tr. & S. V. Co. v. Newport N. & R. V. Co.*, 70 Fed. R. 403; *Massachusetts*, *Frink v. Blackinton*, 80 Fed. R. 806. *Michigan*, *Detroit v. Detroit City R. Co.*, 54 Fed. R. 1. *New York*, *Woolf v. Chisolm*, 30 Fed. R. 881; *Doyle v. Beaupre*, 39 Fed. R. 289; *Mayer v. Ft. Worth & D. C. R. Co.*, 93 Fed. R. 601. In condemnation proceedings in *New Hampshire* the rule of the State Supreme Court as to the time for filing

special pleas in proceedings at law applies. In condemnation proceedings in *North Dakota*, the demand for a jury trial is considered as equivalent to a pleading for the purpose of removals. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Nestor*, 50 Fed. R. 1. *Pennsylvania*, *M'Henry v. N. Y. P. & O. R. Co.*, 25 Fed. R. 65. *South Carolina*, *Tenney v. Am. P. Mfg. Co.*, 96 Fed. R. 919. *Tennessee*, *Deford v. Mehaffy*, 13 Fed. R. 481; *Gavin v. Vance*, 33 Fed. R. 84; *Lockhart v. Memphis & L. R. Co.*, 38 Fed. R. 274; *Turner v. Illinois Cent. R. Co.*, 55 Fed. R. 689. The Federal court declined to take judicial notice of a rule of the State court permitting pleadings to be filed after the statutory time. *Yarnell v. Felton*, 102 Fed. R. 369. *Vermont*, *Sowles v. Witters*, 43 Fed. R. 700. *Virginia*, *Morton's Adm'r v. Baltimore & O. R. Co.*, 157 U. S. 673; *Mahoney v. New So. B. & L. Ass'n*, 70 Fed. R. 513; *West Virginia*, *Wilson v. Winchester & P. R. Co.*, 82 Fed. R. 15.

<sup>3</sup>*Frink v. Blackinton*, 80 Fed. R. 806; *McDonald v. H. M. Co.*, 48 Fed. R. 593.

<sup>4</sup>*Woolf v. Chisolm*, 30 Fed. R. 881; *Doyle v. Beaupre*, 39 Fed. R. 289.

<sup>5</sup>That it does, is said in *Simonson v. Jordan* (S. D. N. Y.), 30 Fed. R. 721; *Dwyer v. Peshall* (S. D. N. Y.), 32

ance and pleading by the defendant before the expiration of the time within which he was required by law to plead, does not limit his time to remove the cause.<sup>6</sup> Where he has not been served, and the time to plead is reckoned from the day of service, it begins to run from the date of his appearance.<sup>7</sup> A removal may be made after a motion to take the bill off the file has been denied,<sup>8</sup> after a demurrer has been overruled,<sup>9</sup> and even after answer,<sup>10</sup> provided that the time originally allowed the defendant to plead has not expired.

Where the plaintiff's original pleading did not present a removable case, but an amendment thereto, by omitting some of the original parties,<sup>11</sup> or by a new allegation concerning the value of the matter in dispute,<sup>12</sup> or by showing that the case arises under the Constitution or laws of the United States,<sup>13</sup>

Fed. R. 497; *Winberg v. Berkeley Co. Ry. Ex. Co.* (S. D. N. Y.), 29 Fed. R. 721; *Rycroft v. Green* (E. D. Pa.), 49 Fed. R. 177; *Schupper v. Consumers' Cordage Co.* (S. D. N. Y.), 72 Fed. R. 803; *Mayer v. Ft. Worth & D. C. R. Co.* (S. D. N. Y.), 93 Fed. R. 601; *Allmark v. Platte S. S. Co.* (S. D. N. Y.), 76 Fed. R. 614; *Chiatovitch v. Hanchett* (D. Nev.), 78 Fed. R. 198; *Dancel v. Goodyear Shoe Mach. Co.*, 106 Fed. R. 551; *Sowles v. Witters* (D. Vt.), 43 Fed. R. 700; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* (D. S. C.), 60 Fed. R. 929; *People's Bank v. Aetna Ins. Co.* (D. S. C.), 53 Fed. R. 161; *Tracy v. Morel* (D. Nev.), 88 Fed. R. 801; *Wedekind v. So. Pac. Co.*, 86 Fed. R. 279, 281. See also *McKeen v. Ives* (D. Ind.), 85 Fed. R. 801. *Contra*: *Dixon v. W. U. Tel. Co.* (N. D. Col.), 38 Fed. R. 377; *Austin v. Gagan* (N. D. Cal.), 39 Fed. R. 626, 627; *Velie v. Manufacturers' Acc. Ins. Co.* (E. D. Wis.), 40 Fed. R. 545; *Spangler v. Atchison, T. & S. F. Co.* (W. D. Mo.), 42 Fed. R. 305, 306; *Ruby C. G. Min. Co. v. Hunter* (W. D. S. D.), 60 Fed. R. 305; *Rock Island Nat. Bank v. J. S. Keator L. Co.* (D. Ill.), 52 Fed. R. 897; *Martin v. Carter* (D. Mont.), 48 Fed. R. 596; *Fox v. South-*

*ern Ry. Co.* (D. N. C.), 80 Fed. R. 945. See for *dicta* tending the same way, *Murray v. Holden* (W. D. Mo.), 2 Fed. R. 740. See also *Delbanco v. Singletary* (D. Nev.), 40 Fed. R. 177; *Pullman P. C. Co. v. Speck*, 113 U. S. 84, 86; *Kaitel v. Wylie* (N. D. Ill.), 38 Fed. R. 865; *Daugherty v. W. U. Tel. Co.* (D. Ind.), 61 Fed. R. 138.

<sup>6</sup> *Conner v. Skagit C. C. Co.*, 45 Fed. R. 802; *Gavin v. Vance*, 33 Fed. R. 84; *Brisenden v. Chamberlain*, 53 Fed. R. 807. But see *Delbanco v. Singletary*, 40 Fed. R. 177.

<sup>7</sup> *Fidelity Tr. & S. V. Co. v. Newport N. & R. V. Co.*, 70 Fed. R. 403; *Case v. Olney*, 106 Fed. R. 483.

<sup>8</sup> *Tennessee Coal, L. & T. B. Co. v. Waller*, 37 Fed. R. 545.

<sup>9</sup> *Tennessee Coal, L. & T. B. Co. v. Waller*, 37 Fed. R. 545. *Contra*, *Delbanco v. Singletary*, 40 Fed. R. 177.

<sup>10</sup> *Gavin v. Vance*, 33 Fed. R. 84, 92. See *Burck v. Taylor*, 39 Fed. R. 581; *Evans v. Dillingham*, 43 Fed. R. 177; *Conner v. Skagit C. C. Co.*, 45 Fed. R. 802.

<sup>11</sup> *Powers v. Ches. & O. Ry. Co.*, 169 U. S. 92, 99.

<sup>12</sup> *Huskins v. Cincinnati, N. O. & T. P. Ry. Co.*, 37 Fed. R. 504.

<sup>13</sup> *Speckert v. German Nat. Bank*,

brings it within the removal act; the time to remove is extended until defendant must plead to the amended pleading. It has been held that the same rule applies where the amendment presents an entirely new case;<sup>14</sup> but not otherwise.<sup>15</sup> It has been held that after the time to plead in a removable case has once expired it cannot be extended by an order opening the default and allowing him to plead.<sup>16</sup> Where there are two defendants and but one controversy, and the time for removal has expired as to one defendant, it is too late for the other defendant to remove the cause, although he has not been previously served,<sup>17</sup> provided that he was named as a party in the plaintiff's pleading. Where, however, after the expiration of the time of the original defendant, others were brought in by amendment, they were allowed to remove because of a Federal question that appeared in the plaintiff's original pleadings.<sup>18</sup> The filing of a pleading in the State court by the defendant is not a necessary prerequisite or accompaniment to the petition for a removal.<sup>19</sup> The bond must be filed with the petition, and cannot be filed subsequently *nunc pro tunc*,<sup>20</sup> although it may be subsequently amended as to a matter of form,<sup>21</sup> but not as

85 Fed. R. 12; *Bailey v. Mosher*, 95 Fed. R. 223; *Guarantee Co. v. Hanway* (C. C. A.), 104 Fed. R. 369.

<sup>14</sup> *Evans v. Dillingham*, 48 Fed. R. 177, 180; *Matton v. Reynolds*, 62 Fed. R. 417; *Mecke v. Valleytown Mineral Co.*, 89 Fed. R. 209.

<sup>15</sup> *Painter v. New R. M. Co.*, 98 Fed. R. 544; *Kaitel v. Wylie*, 38 Fed. R. 865; *Gregory v. Boston S. D. & Tr. Co.*, 88 Fed. R. 3. *Contra*, *Daniel v. Goodyear S. M. Co.*, S. D. N. Y., per *Lacombe, J.*, 106 Fed. R. 551.

<sup>16</sup> *Rock Island Bank v. J. S. Keator L. Co.*, 52 Fed. R. 897; *Hurd v. Gere*, 38 Fed. R. 537. Held *contra*, in S. D. N. Y., where, when the default was made, no complaint had been served. *Daniel v. Goodyear Shoe Mach. Co.*, 106 Fed. R. 551. The omission to enter judgment by default does not extend the time. *Kansas City, F. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 303. Even where there was an oral understanding that no default should be

taken. *Price v. Lehigh Val. R. Co.*, 65 Fed. R. 825. The fact that the defendant's attorney was prevented by inevitable accident from filing the petition will not enlarge the time. *Daugherty v. W. U. Tel. Co.*, 61 Fed. R. 138.

<sup>17</sup> *Fletcher v. Hamlet*, 116 U. S. 408; *Houston & T. C. Ry. Co. v. Shirley*, 111 U. S. 358; *Hakes v. Burns*, 40 Fed. R. 33. But see *Mutual L. Ins. Co. v. Champlin*, 21 Fed. R. 85.

<sup>18</sup> *Green v. Valley*, 101 Fed. R. 882. Where a case is not removable until after an amendment, the time expires when the defendant is required to plead to the amended pleading, unless, perhaps, such time is unreasonably short. *Enders v. L. E. & W. R. Co.*, 101 Fed. R. 202.

<sup>19</sup> *Egan v. Chicago, M. & St. P. Ry. Co.*, 53 Fed. R. 675.

<sup>20</sup> *Austin v. Gagan*, 39 Fed. R. 626; *Kaitel v. Wylie*, 38 Fed. R. 865.

<sup>21</sup> *Harris v. Delaware, L. & W. R.*

to a matter of substance.<sup>22</sup> A stay in the State court for non-payment of motion costs does not prevent a removal unless the defendant has obtained some benefit in the State court which he seeks to thus repudiate.<sup>23</sup> It is unsettled whether the petition and bond may be filed in vacation.<sup>24</sup> The better practice is when the time expires during vacation to present the petition to the State judge in chambers, if that is practicable, and to file the petition in the clerk's office.<sup>25</sup> The objection that the petition was filed too late may be waived by taking a subsequent proceeding in the cause without raising it.<sup>26</sup>

**§ 386. Practice on removal for prejudice or local influence.**—The practice on the removal of cases for prejudice or local influence is prescribed by the Judiciary Act of 1887, as amended in 1888, as follows: "Where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of

Co., 18 Fed. R. 833; Beede v. Cheeney, 5 Fed. R. 388; Deford v. Mehaffy, 13 Fed. R. 481. See *infra*, § 391.

<sup>22</sup> Austin v. Gagan, 39 Fed. R. 626; Burdick v. Hale, 7 Biss. 96. See *infra*, § 391.

<sup>23</sup> Hulbert v. Russo, 64 Fed. R. 8.

<sup>24</sup> Osgood v. Chicago, D. & V. R. Co., 6 Biss. 330; Brown v. Murray, Nelson & Co., 43 Fed. R. 614; State v. Coosaw Min. Co., 45 Fed. R. 804, 811; Burck v. Taylor, 39 Fed. R. 581, hold that it can. See Monroe v. Will-

iamson, 81 Fed. R. 977. *Contra*. Shedd v. Fuller, 86 Fed. R. 609; Williams v. Massachusetts Ben. Ass'n, 47 Fed. R. 533.

<sup>25</sup> Mecke v. Valleytown M. Co. (C. C. A.), 98 Fed. R. 697.

<sup>26</sup> Ayers v. Watson, 113 U. S. 594, 597; No. Pac. R. Co. v. Austin, 135 U. S. 315, 318; Connell v. Smiley, 156 U. S. 335; Powers v. Ches. & O. Ry. Co., 169 U. S. 92, 98; *infra*, § 393. But see Collins v. Stott, 76 Fed. R. 613.

the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any Circuit Court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff, that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the Circuit Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto."<sup>1</sup>

By the practice before the Act of 1887 a cause might be removed for prejudice or local influence, upon the filing by the defendant with his petition and bond of an affidavit "that he has reason to believe that from prejudice and local influence he will not be able to obtain justice in the State court in which the action is brought, or in any other State court to which he may be able to remove the action."<sup>2</sup> Under the present statute the rule is that the Circuit Court must be legally, not morally, satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the State court.<sup>3</sup> There must be some proof suitable to the nature of the case; at least an affidavit of a credible person, and a statement of facts in such affidavit which sufficiently show the truth of the allegation.<sup>4</sup> The Supreme Court has

§ 386. <sup>1</sup> 18 St. at L. 470, § 2, as amended by 24 St. at L. 552; and 25 St. at L. 433. These acts have repealed U. S. R. S., § 639. *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 467; *Fisk v. Henarie*, 142 U. S. 459; *In re Pennsylvania Co.*, 137 U. S. 451; *Hanrick v. Hanrick*, 152 U. S. 192, 197. See *Foster's Federal Judiciary Acts*, pp. 83, 56-58. The clause divesting the court of jurisdiction over pending causes was held to be constitutional, although the removing party had expended a considerable sum of money

in taking testimony in the Circuit Court, after the removal and before the Act of 1887, which testimony was not admissible in the State court to which the case was remanded. *Birdseye v. Shaeffer*, 87 Fed. R. 821.

<sup>2</sup> U. S. R. S., § 639.

<sup>3</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 457; *Tacoma v. Wright*, 84 Fed. R. 836.

<sup>4</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 457.

The following definition of the phrase "prejudice or local influence"

said that the amount and manner of the proof required in each case is in the discretion of the Circuit Court.<sup>5</sup> A perfunctory showing by a formal affidavit of mere belief will not be sufficient.<sup>6</sup> If the petition for removal states the facts upon which

was given by Judge Jackson: "Such differences of opinion between the courts was certainly not the 'prejudice or local influence' which the law contemplates as furnishing a ground or reason for removing a suit from one jurisdiction to another. Webster defines 'prejudice' as follows: 'An opinion or decision of mind formed without due examination; prejudgment; a bias, or leaning towards one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge.' It is in this general sense that the removal acts use the word 'prejudice,' and it cannot be properly applied to the solemn judgment of the highest court of a State, on the mere ground that said judgment differs from that of the Supreme Court of the United States on the same question. The term 'local influence,' if not synonymous with 'prejudice,' manifestly refers to an improper influence exerted by or existing in favor of one side or against the other, which will prevent the latter from obtaining justice in the State courts. The 'prejudice or local influence' which the law meant to make the grounds of removal may relate to the person of the litigant or the subject-matter of the litiga-

tion; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice. If in any case a State court's decision can be made the ground of removal, it must be alleged and shown that such decision proceeded, not from error or mistake of law, but from that improper bias or unreasonable predilection which constitutes the 'prejudice' or 'local influence' contemplated by the law." *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. R. 836, 843.

"Questions of prejudice or local influence are matters resting largely in opinion, and are not generally susceptible of proof by evidence of facts like issues in ordinary actions at law or suits in equity." *Reeves v. Corning*, 57 Fed. R. 774, 776. Judge Deady said: "This case is a good illustration of the indelicacy and inexpediency of the proceeding authorized by the Act of 1887, whereby this court may be required to pass upon the fitness of a State judge to try a particular case. The affidavits of the defendants amount to nothing. Of course there is no prejudice in the county against the plaintiff personally, for he is unknown to the community. But there may be a prejudice in favor of his adversary that would be as much in his way

<sup>5</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 457. The Circuit Court of Appeals for the Eighth Circuit has, however, reversed a decree because in their opinion the affidavit of local prejudice and local influence was

not sufficiently specific. *P. Schwenk S. Co. v. Strang*, 59 Fed. R. 209.

<sup>6</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 453; *Collins v. Campbell*, 62 Fed. R. 850.



the allegation is founded, and that petition be verified by the affidavit of a person in whom the court has confidence, this may be regarded as sufficient *prima facie* proof to satisfy the conscience of the court; but the court may require further

of obtaining justice as a prejudice against himself. The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against the party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community. Then there is the element of local influence, which implies that in a controversy between a stranger and resident parties having the power through wealth, business, or social relations, or personal popularity, or all combined, to direct or materially aid in the direction of political parties, and control the selection of public officers and the distribution of party emoluments, the former may be at a great disadvantage, if not powerless to assert his right. And this implication is no unusual reflection on any particular community or persons. On the contrary, it is such a well understood and recognized frailty of human nature that jurisdiction of controversies between citizens of different States was expressly given by the Constitution to the national government, and this, not only as a means of doing justice, but of facilitating the trade and intercourse between the people of the several States, which the Constitution was formed, for more than any other purpose, to protect and promote. Neither is it unreasonable that in a case like this, where a stranger from another State is seeking to set aside conveyances made in favor of local creditors of long standing and high character in the community by a failing debtor

of like standing and character, that there should be prejudice and local influence, not against the plaintiff personally, but against his cause, and in favor of his adversaries. How far this influence and local prejudice might extend, and whether it would consciously or unconsciously influence the mind and action of the court, would depend largely on the temper and character of the judges. Counsel for the defendants maintain that, admitting there is a prejudice and local influence in Linn county in favor of the defendants in this case, the case being an equity one, to be decided by the court without a jury, there is no reason to think or believe that the circuit judge would be affected or influenced by it in the least degree. On the other hand, counsel for the plaintiff contends that on the proofs and in the nature of things there is a strong prejudice and influence in Linn county in favor of the defendants in this controversy; and that the circuit judge, who holds his office by the good will of this community, and is a particular friend of the principal defendant, may be, and probably will be, more or less unconsciously affected in his mental vision and conclusions by these circumstances." *Neale v. Foster*, 31 Fed. R. 53, 55, 56. The removal was sustained upon grounds independent of prejudice and local influence.

In a suit for a declaration that a street railroad franchise had expired, and for a mandatory injunction compelling the grantee to vacate the streets, the defendant presented an affidavit by the secretary of a trust company, swearing positively to



proof.<sup>7</sup> An affidavit couched in the general terms of the statute, with the additional averment "that affiant knows the facts of such prejudice and local influence, and makes this affidavit from such knowledge," was held to be insufficient.<sup>8</sup> It has been held that an affidavit upon belief is sufficient when it states upon belief the facts which show the prejudice or local influence, and the grounds of the deponent's belief that they occurred.<sup>9</sup> It is the safer practice to show in the affidavit that

prejudice and local interest against the defendant, and setting forth upon information and belief certain facts as evidence of the same, including a riot; the conduct of the mayor and council in reference thereto, as evidenced by official records and otherwise; the calling and proceedings of a public meeting; the appointment of a committee by that meeting and their public acts; the speeches at the meeting, as evidenced by a stenographic report thereof; extracts from the local press; the issues of a local election, and its results; the messages of the mayor; the resolutions of the council and other matters of local history. A removal was ordered. *Detroit v. Detroit City Ry. Co.*, 54 Fed. R. 1. Removals were ordered in *Turnbull Wagon Co. v. Linthicum Carriage Co.*, 80 Fed. R. 4; *Smith v. Crosby Lumber Co.*, 46 Fed. R. 819; s. c. (C. C. A.), 51 Fed. R. 63; *Hall v. Chattanooga Agr. Works*, 48 Fed. R. 599; *Herndon v. Southern R. Co.*, 76 Fed. R. 398; *Tacomoma v. Wright*, 84 Fed. R. 836.

In an action by a foreign corporation for the price of lumber sold, the defendant counterclaimed for services rendered, and for damages for a breach of contract. In support of a petition for a removal to a Federal court, the plaintiff filed an affidavit signed by several citizens of the county in which the defendant resided, stating in general terms that from prejudice and local influence the plaintiff could not obtain a fair

trial in that county or in the judicial district. The facts stated in the affidavits were that the defendant had a large and influential business connection in the county and district, and that the counties had more or less litigation in their corporate capacity, which had excited a prejudice against non-resident corporations. This affidavit was controverted by an affidavit signed by numerous citizens of the vicinity. The court refused to remove the case. *Carson & Rand L. Co. v. Holtzclaw*, 89 Fed. R. 885.

An affidavit that defendant has no acquaintance in the county in which the trial in the State court will be had; that plaintiff is well known there as a lawyer and a politician, having lived and practiced law at the county-seat many years, and having been a candidate for the office of attorney-general of the State,—was held insufficient to justify a removal. *Dennison v. Brown*, 38 Fed. R. 535.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Niblock v. Alexander*, 44 Fed. R. 306. See to a similar effect, *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. R. 114; *Amy v. Manning*, 38 Fed. R. 536; s. c., 38 Fed. R. 868; *P. Schwenk Co. v. Strang*, 59 Fed. R. 209. *Contra*, *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. R. 836, 841; *Cooper v. Richmond & D. R. Co.*, 42 Fed. R. 697.

<sup>9</sup> *Detroit v. Detroit City Ry. Co.*, 54 Fed. R. 1, 11.

the same prejudice or local influence exists in all the counties in the State to which the venue could be changed;<sup>10</sup> unless a change of venue is discretionary and has been refused, or an opinion that it should not be granted has been expressed by the judge to whom the application in the State court would be made;<sup>11</sup> or unless the same prejudiced judge may preside in the county to which the venue may be changed.<sup>12</sup>

The court may require notice of the application for a removal on account of prejudice or local influence to be served on the other side; permit a traverse of the facts alleged by the party seeking the removal; and try the facts as to prejudice or local influence before passing on the question.<sup>13</sup> It has been held at circuit that the court may in its discretion grant the application *ex parte*,<sup>14</sup> and refuse to allow the affidavit to be controverted.<sup>15</sup> The court has discretionary power to allow a rehear-

<sup>10</sup> *Rike v. Floyd*, 42 Fed. R. 247; *Goldworthy v. Chicago, M. & St. P. Ry. Co.*, 38 Fed. R. 769. An affidavit for the removal of an action for false imprisonment from the Circuit Court of Cook County, Illinois, to the United States Circuit Court, alleged that there had been four long jury trials involving the same matters before the Circuit Court of Cook County, a hearing before a justice of the peace, the grand jury, the appellate court, and the directors of the Board of Trade; that the case involved the manner of doing business on the Board of Trade; that it had caused a great deal of talk around the court-house, and had become widely known; that many warehousemen, elevator men, brokers, commission men, and many thousands of people in and around Cook county had discussed it; and that through the influence of plaintiff and his friends, defendants believed a prejudice had grown up against them, who were non-residents. It was held that, as the Illinois statute provides that a cause may be removed for local prejudice to some other court of competent jurisdic-

tion in some other convenient county, to which there is no valid objection, the existence of prejudice was not sufficiently shown to justify a removal to the Federal court, since the affidavit showed that the prejudice was confined mainly, if not entirely, to Cook county. *Robison v. Hardy*, 38 Fed. R. 49. But see *Smith v. Crosby Lumber Co.*, 46 Fed. R. 819; *Wolcott v. Watson*, 46 Fed. R. 529, 532; *Detroit v. Detroit City Ry. Co.*, 54 Fed. R. 1, 13.

<sup>11</sup> *Smith v. Crosby Lumber Co.*, 46 Fed. R. 819.

<sup>12</sup> *Wolcott v. Watson*, 46 Fed. R. 529, 536.

<sup>13</sup> *Smith v. Crosby L. Co.*, 46 Fed. R. 819; *Amy v. Manning*, 38 Fed. R. 868; *Malone v. Richmond & D. R. Co.*, 35 Fed. R. 625; *Dennison v. Brown*, 38 Fed. R. 535; *Herndon v. Southern R. Co.*, 73 Fed. R. 307. It was held by the Circuit Court of Appeals for the Eighth Circuit that notice must be given. *P. Schwenk & Co. v. Strang* (C. C. A.), 59 Fed. R. 209. See *Reeves v. Corning*, 51 Fed. R. 774, 776.

<sup>14</sup> *Crotts v. Southern Ry. Co.*, 90 Fed. R. 1, and cases cited in note 17.

<sup>15</sup> *Adelbert College v. Toledo, W. &*

ing on affidavits by the plaintiff, but ordinarily will refuse a rehearing,<sup>16</sup> "unless it is clearly made to appear that the court has been imposed upon or misled."<sup>17</sup>

Leave to move for a rehearing should first be obtained, even though the first application was *ex parte*.<sup>18</sup> A plea to the petition for a removal, which simply denies the allegations as to the petitioner's belief, but not the allegations as to the existence of prejudice or local influence, does not raise an issue.<sup>19</sup> It has been held, that when notice of the application is required, a notice served three days before the hearing is sufficient; and in that case two weeks' additional time was given to the party opposing the removal.<sup>20</sup> It is the safer practice to have the affidavit made by the party seeking the removal, not by his attorney.<sup>21</sup> When the affidavit is made in another State it should be attested so as to make it admissible according to the practice of the court where the suit is pending before the removal.<sup>22</sup> The application must be made to the Federal court, and all questions thereby raised must be determined by the Federal court.<sup>23</sup> The petition for a removal for prejudice and local influence must be presented to and filed in the Federal court, but it is the better practice to file in the State court a certified copy of the same, and of the order of the Federal court thereupon.<sup>24</sup> An order of the Federal court granting or denying the application should be obtained and filed in the State court, and the transcript, including a copy of such order,

W. Ry. Co., 47 Fed. R. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. R. 535; Reeves v. Corning, 51 Fed. R. 774. *Contra*, P. Schwenk & Co. v. Strang, 59 Fed. R. 209.

<sup>16</sup> Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. R. 836, 843; Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. R. 535; Reeves v. Corning, 51 Fed. R. 774.

<sup>17</sup> Reeves v. Corning, 51 Fed. R. 774, 779.

<sup>18</sup> Carpenter v. Chicago, M. & St. P. Ry. Co., 47 Fed. R. 535.

<sup>19</sup> County Court of Taylor County v. Baltimore & O. R. Co., 85 Fed. R. 161.

<sup>20</sup> Carson & R. L. Co. v. Holtzclaw, 89 Fed. R. 578.

<sup>21</sup> Duff v. Duff, 81 Fed. R. 772; Speer on Removal of Causes, § 17, p. 26, note.

<sup>22</sup> Bowen v. Chase, 7 Blatchf. 255; Speer on Removal of Causes, § 18, p. 26, note.

<sup>23</sup> Kaitel v. Wylie, 88 Fed. R. 865; Huskins v. Cincinnati, N. O. & T. P. Ry. Co., 37 Fed. R. 504.

<sup>24</sup> Malone v. Richmond & D. R. Co., 85 Fed. R. 625; Kaitel v. Wylie, 88 Fed. R. 865; Short v. Chicago, M. & St. P. Ry. Co., 88 Fed. R. 114; s. c., 84 Fed. R. 225.

subsequently filed in the Federal court.<sup>25</sup> An entry in the record of the Circuit Court of a finding of the jurisdictional facts is not sufficient.<sup>26</sup>

A case may be removed for prejudice or local influence by any one of several defendants,<sup>27</sup> and whether the controversy is separable or not.<sup>28</sup> A defendant cannot remove a case because of prejudice and local influence in favor of another defendant with whom he has a separate controversy, when he and the plaintiff are citizens of the same State.<sup>29</sup>

A plaintiff against whom a counterclaim has been set up was in one case regarded as a defendant, and allowed a removal on the ground of prejudice and local influence.<sup>30</sup> On a taxpayer's appeal from the decision of a board allowing a claim against a county, the claimant was considered as the plaintiff, and consequently denied the right to remove the case.<sup>31</sup> All the parties on one side of the controversy must be citizens of different States from all of their opponents.<sup>32</sup> It has been held that a suit to which an alien is a party cannot be thus removed;<sup>33</sup> that no suit can be thus removed unless all the plaintiffs are

<sup>25</sup> *Pennsylvania Co. v. Bender*, 148 U. S. 255, 257, 258.

<sup>26</sup> *Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. R. 145; *Pennsylvania Co. v. Bender*, 148 U. S. 257.

<sup>27</sup> *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed. R. 849; *Fisk v. Henarie*, 32 Fed. R. 417; *Detroit v. Detroit City Ry. Co.*, 54 Fed. R. 1; *Haire v. Rome R. Co.*, 57 Fed. R. 321. It has been held: that a removal cannot be had unless all the parties on one side of the controversy are citizens of a different State from that of all the parties upon the other side. *Terre Haute v. Evansville & T. H. R. Co.*, 106 Fed. R. 549. And that when a suit has been discontinued against the only defendant who was a citizen of a different State from the plaintiff, there must be a remand. *Bane v. Keefer*, 66 Fed. R. 545, 610.

<sup>28</sup> *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed. R. 849; *Haire v. Rome R. Co.*, 57 Fed. R. 321.

<sup>29</sup> *Hanrick v. Hanrick*, 153 U. S. 192.

<sup>30</sup> *Carson & R. L. Co. v. Holtzclaw*, 39 Fed. R. 578. But see *supra*, § 383, note 10. Otherwise a plaintiff cannot remove a case upon this ground. *Campbell v. Collins*, 62 Fed. R. 849.

<sup>31</sup> *Tullock v. Webster County*, 40 Fed. R. 706; *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. R. 551; *supra*, § 383, note 87.

<sup>32</sup> *Jefferson v. Driver*, 117 U. S. 272; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54; *Young v. Parker's Adm'r*, 132 U. S. 267; *Anderson v. Bowers*, 43 Fed. R. 321; *Rike v. Floyd*, 42 Fed. R. 247. *Contra*, *Haire v. Rome R. Co.*, 57 Fed. R. 321; *Jackson & S. Co. v. Pearson*, 60 Fed. R. 113; *Whelan v. N. Y., L. E. & W. R. Co.*, 35 Fed. R. 849; *Hall v. Chattanooga Agr. Works*, 48 Fed. R. 599; *Detroit v. Detroit City Ry. Co.*, 54 Fed. R. 1.

<sup>33</sup> *Cohn v. Louisville, N. O. & T. R. Co.*, 39 Fed. R. 727. See *Grand Trunk Ry. Co. v. Twitchell (C. C. A.)*, 59 Fed. R. 627.

citizens of the State where the suit is brought;<sup>34</sup> and that if the controversy is separable, the Circuit Court may remand to the State court so much as does not affect the defendant who procured the removal, but that otherwise, the whole case remains in the Federal court.<sup>35</sup> A case in which the matter in dispute does not exceed two thousand dollars cannot be removed on account of prejudice or local influence.<sup>36</sup> It seems that the restriction as to suits by assignees applies to removals for prejudice or local influence.<sup>37</sup> It has been held that, on an application for such a removal, the papers must show that the difference of citizenship existed when the suit was commenced, as well as when the petition is filed.<sup>38</sup>

What constitutes a trial within the meaning of the Act of 1887 is unsettled. Under the old practice, it was held that the argument of a demurrer was a trial,<sup>39</sup> and in a case at Circuit, that the argument of a contested motion for a preliminary injunction and an appeal from the order was a trial.<sup>40</sup> Since the Act of 1887 a few cases at Circuit have held that the argument of a demurrer was not a trial;<sup>41</sup> that the entry of an order taking a bill as confessed is not a trial;<sup>42</sup> and that after an appeal from a decision of a State court of probate, when a trial of the facts is to be had before a jury in the appellate court, it is not too late before the second trial to remove the case for

<sup>34</sup> *Thouren v. East Tennessee, V. & G. Ry. Co.*, 88 Fed. R. 678; *Niblock v. Alexander*, 44 Fed. R. 806; *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. R. 886; *Gann v. Northwestern Ry. Co.*, 57 Fed. R. 417.

<sup>35</sup> *Whelan v. N. Y., L. E. & W. R. Co.*, 85 Fed. R. 849; *Haire v. Rome R. Co.*, 57 Fed. R. 821, 828. But see *Jefferson v. Driver*, 117 U. S. 272; *Cambria L. Co. v. Ashburn*, 118 U. S. 54; *Young v. Parker's Adm'r*, 132 U. S. 267.

<sup>36</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 457.

<sup>37</sup> *In re Pennsylvania Co.*, 137 U. S. 451, 456. But see *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81.

<sup>38</sup> *Young v. Parker's Adm'r*, 132 U. S. 267. See *Johnson v. Monell*, 1 Woolw. 390, 397; *Miller v. Chicago*,

*B. & Q. Ry. Co.*, 17 Fed. R. 97; *Sands v. Smith*, 1 Dill 290; *Cook v. Whitney*, 8 Woods, 715; *Hone v. Dillon*, 29 Fed. R. 465; *Frelinghuysen v. Baldwin*, 19 Fed. R. 49; *Schnadig v. Flescher*, 29 Fed. R. 465.

<sup>39</sup> *Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 U. S. 711; *Gregory v. Hartley*, 118 U. S. 742. But see *Hone v. Dillon*, 29 Fed. R. 465.

<sup>40</sup> *Chicago, L. & N. P. R. Co. v. Minnesota & N. W. R. Co.*, 29 Fed. R. 337.

<sup>41</sup> *Whelan v. N. Y., L. E. & W. R. Co.*, 85 Fed. R. 849; *Fisk v. Henarie*, 82 Fed. R. 417, 425. *Contra*, *Lookout Mountain R. Co. v. Houston*, 32 Fed. R. 711.

<sup>42</sup> *McHenry v. N. Y., P. & O. R. Co.*, 25 Fed. R. 65. See also *Removal Cases*, 100 U. S. 457, 473; *Maloy v. Duden*, 25 Fed. R. 673.

prejudice or local influence;<sup>43</sup> and after the first trial has begun the case cannot be removed, although a new trial is subsequently directed.<sup>44</sup>

It has been held that a non-resident defendant, against whom a void order for taking the bill *pro confesso* was entered and afterwards set aside, can remove a case for prejudice or local influence at the first term at which the trial of the issues raised by its answer can be had if the trial has not begun.<sup>45</sup> After the expiration of the time at which the removal was granted it was held to be too late to remove to remand a cause for prejudice or local influence.<sup>46</sup> By failing to prosecute a motion for a remand of a case removed for prejudice or local influence, the plaintiff waives all objections to the removal which he is competent to waive, including the objection that the prejudice or local influence was not sufficiently proved; but not the objection that no order for the removal was made, nor that the petition failed to allege the jurisdictional facts.<sup>47</sup>

**§ 387. Practice on removals of suits containing controversies between citizens of the same State, claiming land under grants of different States.**—The statute regulating the removals of suits in which there is a controversy between citizens of the same State claiming land under grants of different States, is as follows: "If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim, and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he

<sup>43</sup> *Brodhead v. Shoemaker*, 44 Fed. R. 518. But see *McDonnell v. Jordan*, 178 U. S. 229.

<sup>44</sup> *Fisk v. Henarie*, 142 U. S. 459; *McDonnell v. Jordan*, 178 U. S. 229.

<sup>45</sup> *Detroit v. Detroit City Ry. Co.*, 54 Fed. R. 1, 10, 11.

<sup>46</sup> *Crotts v. Southern Ry. Co.*, 90 Fed. R. 1; *Parks v. Southern Ry. Co.*, 90 Fed. R. 8.

<sup>47</sup> *Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. R. 145.



or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as herein before mentioned in this act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.”<sup>1</sup>

**§ 388. Practice on removal of suits against revenue officers, and officers of either House of Congress.**—In the removal of proceedings, civil or criminal, against revenue officers of the United States, or persons who are or have been officers of either House of Congress, for acts done by them in the discharge of their official duty, the practice is regulated by the Revised Statutes as follows: The petition must set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, it must be presented to the Circuit Court, if in session, or if it be not, to the clerk thereof at his office, and filed in said office. The cause is thereupon entered on the docket of the Circuit Court, and proceeds as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or another process, except *capias*, the clerk of the Circuit Court issues a writ of *certiorari* to the State court, requiring it to send to the Circuit Court the record and proceedings in the cause. When it is commenced by *capias* or any other similar form of proceeding by which a personal ar-

§ 387. <sup>1</sup> 18 St. at L. 470, § 33, as amended by 25 St. at L. 43.



rest is ordered, the clerk issues a writ of *habeas corpus cum causa*, a duplicate of which must be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy; or by some person duly authorized thereto; and thereupon it is the duty of the State court to stay all further proceedings in the cause; and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, is held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State court is void.<sup>1</sup> It has been held that the removal may be had, when a complaint and information has been filed with a justice of the peace and a warrant issued by him in a prosecution for a misdemeanor which is not the subject of indictment.<sup>2</sup> But otherwise the removal cannot be had before indictment or an information in the State court.<sup>3</sup> Where a revenue officer has been arrested for an official act, his only remedy before indictment is an application to the Federal court for a writ of *habeas corpus*.<sup>4</sup> If the defendant in the suit or prosecution be in actual custody on mesne process therein, it is the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the Circuit Court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the Circuit Court that no copy of the record and proceedings therein in the State court can be obtained, the Circuit Court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said Circuit Court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant.<sup>5</sup> It is the duty of the State prosecuting attorney to continue the prosecution and of the United States district attorney to defend after the removal.<sup>6</sup> If the indictment is for any

§ 388. U. S. R. S., § 643; 18 St. at L. 401. See *In re Neagle*, 135 U. S. 1; *State v. Sullivan*, 50 Fed. R. 593.

<sup>2</sup> *Commonwealth of Virginia v. Bingham*, 88 Fed. R. 561.

<sup>3</sup> *Virginia v. Paul*, 148 U. S. 107.

<sup>4</sup> *Virginia v. Paul*, 148 U. S. 107, 121; U. S. R. S., §§ 751, 753; *supra*, § 366.

<sup>5</sup> U. S. R. S., § 643; 18 St. at L. 401.

<sup>6</sup> *Delaware v. Emerson*, 8 Fed. R. 411.

reason dismissed after the removal, the Federal court has no jurisdiction to find a new indictment for the offense against the State law.<sup>1</sup>

**§ 389. Practice on removal of cases arising under the civil rights laws.**— Upon the filing of a petition for the removal of a case arising under the civil rights laws, the Revised Statutes provide that “all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect, as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the Circuit Court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process: and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the Circuit Court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the Circuit Court as herein provided, a certificate under the seal of the Circuit Court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed.”<sup>1</sup>

“When all acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said Circuit Court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said

<sup>1</sup> *Bush v. Kentucky*, 107 U. S. 110, 115. § 389. <sup>1</sup> U. S. R. S., § 641.

writ, to take the body of the defendant into custody, to be dealt with in said Circuit Court according to law and the orders of said court, or in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."<sup>2</sup> After the Circuit Court has quashed an indictment in such a case, it has no jurisdiction to find a new indictment, but it may remand the prisoner to the custody of the State court, which may then find a new indictment.<sup>3</sup> This statute does not authorize the removal of a case where the Constitution and laws of the State do not discriminate against the accused.<sup>4</sup> The remedy where it is the custom to exclude colored men from grand juries is by a motion to quash the indictment, which can be reviewed by a writ of error to the final judgment of the Supreme Court of the United States.<sup>5</sup> A case cannot be removed under this statute because of an unjust discrimination against a defendant before the trial,<sup>6</sup> or upon the trial,<sup>7</sup> which is not based upon a provision in the State Constitution or laws. A civil suit by a State against one of its own citizens cannot for that reason be removed.<sup>8</sup>

**§ 390. Filing of record.**—The statute regulating the filing of the record after a removal is as follows: "That in all causes removable under this act, if the term of the Circuit Court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said Circuit Court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after tender of legal fees for such

<sup>2</sup> U. S. R. S., § 642.

<sup>3</sup> Bush v. Kentucky, 107 U. S. 110.

<sup>4</sup> Neal v. Delaware, 103 U. S. 370;  
Gibson v. Mississippi, 162 U. S. 565.

<sup>5</sup> Gibson v. Mississippi, 162 U. S.  
565, 584; U. S. v. Gale, 109 U. S. 65,

69; Neal v. Delaware, 103 U. S. 370;  
Smith v. Mississippi, 162 U. S. 592.

<sup>6</sup> California v. Chue Fan, 42 Fed.  
R. 865; Gibson v. Mississippi, 162  
U. S. 565.

<sup>7</sup> Murray v. Louisiana, 163 U. S. 101.

<sup>8</sup> Alabama v. Wolfe, 18 Fed. R. 836.

copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court. And the Circuit Court to which any cause shall be removable under this act shall have power to issue a writ of *certiorari* to said State court, commanding said State court to make a return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the Circuit Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding. But if said order shall be complied with, then said Circuit Court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said Circuit Court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.”<sup>1</sup> The failure to file a copy of the record on or before the first day of its next session does not deprive the Federal court of jurisdiction to proceed in the suit; and that court has power to allow the record to be subsequently filed.<sup>2</sup> Misinformation from the clerk as to the time when the record

§ 390. <sup>1</sup> 18 St. at L. 470, § 7; 25 St. at L. 828.

<sup>2</sup> St. Paul & C. Ry. Co. v. McLean, 108 U. S. 212, 216; Railroad Co. v. Koontz, 104 U. S. 5; Bright v. Milwaukee & St. P. R. Co., 14 Blatchf.

214; Woolridge v. McKenna, 8 Fed. R. 650; Winchell v. Coney, 27 Fed. R. 482; Rowell v. Hill, 28 Fed. R. 433; McGregor v. McGillis, 30 Fed. R. 388; Lucker v. Phoenix Assur. Co., 66 Fed. R. 161.

must be filed was held to be a sufficient excuse.<sup>3</sup> If the removing party is forced by his adversary to remain in the State court, such adversary waives the requirement of the law as to the time of filing the record until the State court lets go its jurisdiction.<sup>4</sup> It has been held that before the first day of the succeeding term either party may obtain leave from the Circuit Court to file the record,<sup>5</sup> or even file the record without such leave;<sup>6</sup> and that, after the record is filed, the Federal court has jurisdiction to remand the case<sup>7</sup> or grant a provisional remedy;<sup>8</sup> but that the cause cannot be heard and determined until the time named in the bond has expired.<sup>9</sup> It has been held, under a rule in the Ninth Circuit, that the plaintiff may file the record in the Federal court at any time after the filing of the petition and bond in the State court by the defendant, and that after the service of notice of such filing the Federal court will take jurisdiction of the cause for all purposes.<sup>10</sup> Where the Circuit Court is held in different places in the district, the record should be filed in the clerk's office at that place where the suit was pending in the State court, or in the nearest and most convenient place to that where such court is held,<sup>11</sup> but, it seems that the filing of the record in another office of the clerk of the same Federal court is not a ground for a remand.<sup>12</sup> The pleadings are part of the record, which must be filed.<sup>13</sup> So are

<sup>3</sup> *Burgunder v. Browne*, 59 Fed. R. 497. But see *Hatch's Adm'x v. Wadley*, 84 Fed. R. 913.

<sup>4</sup> *Railroad Co. v. Koontz*, 104 U. S. 5, 16.

<sup>5</sup> *Mahoney M. Co. v. Bennett*, 5 Saw. 141; *Commercial & S. Bank v. Corbett*, 5 Saw. 172; *Hartford & C. W. R. Co. v. Montague*, 94 Fed. R. 227. *Contra*, see *Hamilton v. Fowler*, 83 Fed. R. 321; *K. C. & T. R. Co. v. Interstate Lumber Co.*, 36 Fed. R. 9.

<sup>6</sup> *Anderson v. Appleton*, 32 Fed. R. 855; *Mills v. Newell*, 41 Fed. R. 529; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. R. 773. See *Delbanco v. Singletary*, 40 Fed. R. 177.

<sup>7</sup> *Anderson v. Appleton*, 32 Fed. R. 855; *Delbanco v. Singletary*, 40 Fed. R. 177; *Mills v. Newell*, 41 Fed. R.

529; *Thompson v. Chicago, St. P. & K. C. Ry. Co.*, 60 Fed. R. 773; *Ryder v. Bateman*, 93 Fed. R. 16. But see *Railroad Co. v. Koontz*, 104 U. S. 5; *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 36 Fed. R. 9.

<sup>8</sup> *Mahoney M. Co. v. Bennett*, 5 Saw. 141; *C. & S. Bank v. Corbett*, 5 Saw. 172; *Kansas City & T. Ry. Co. v. Interstate L. Co.*, 36 Fed. R. 9.

<sup>9</sup> *Matter of Barnesville & M. R. Co.*, 2 McCrary, 216. But see *Delbanco v. Singletary*, 40 Fed. R. 177.

<sup>10</sup> *Delbanco v. Singletary*, 40 Fed. R. 177.

<sup>11</sup> *Cobb v. Globe M. L. Ins. Co.*, 3 Hughes, 452. See *Henderson v. Cabell*, 43 Fed. R. 257, 259.

<sup>12</sup> *Henderson v. Cabell*, 43 Fed. R. 257.

<sup>13</sup> *McBratney v. Usher*, 1 Dill 867.

all depositions on file in the State court;<sup>14</sup> and also, it has been said, entries in the journals of the court.<sup>15</sup> An omission of a small part of the record is not a ground for a remand, but may be cured upon a suggestion of a diminution of the record.<sup>16</sup>

**§ 391. Practice after removal.**—The statute provides “that the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in said State court prior to its removal.”<sup>1</sup> It has been doubted whether, after removal, the complaint may be amended so that process can be served by publication.<sup>2</sup> If the suit in the State court is in its nature an action at common law, no repleader is necessary after the removal.<sup>3</sup> When it is in its nature equitable, a repleader is customary, but not indispensable if the allegations in the pleading in the State court are sufficient.<sup>4</sup> When the suit in the State court unites legal and equitable grounds of relief or defense, as authorized by the State statute, it may be recast into two cases after the removal.<sup>5</sup> In such a case a repleader is necessary.<sup>6</sup> The necessity of a repleader may be

<sup>14</sup> *Miller v. Tobin*, 18 Fed. R. 609.

<sup>15</sup> *Probst v. Cowen*, 91 Fed. R. 929, 931.

<sup>16</sup> *Ibid.*

§ 391. <sup>1</sup> 18 St. at L. 470, § 6; 25 St. at L., ch. 433.

<sup>2</sup> *Adams v. Heckscher*, 80 Fed. R. 742; *supra*, § 97.

<sup>3</sup> *Dart v. McKinney*, 9 Blatchf. 359; *Merchants' & M. Nat. Bank v. Wheeler*, 13 Blatchf. 218; *Bills v. N. O., St. L. & C. R. Co.*, 13 Blatchf. 227. But see *Whittenton v. M. & O. R. P. Co.*, 19 Fed. R. 273; *No. Pac. R. Co. v. Paine*, 119 U. S. 561. But see *M'Connell v. Provident Sav. L. Ass. Soc. (C. C. A.)*, 69 Fed. R. 113, 115.

<sup>4</sup> *Dillon on Removal of Causes*, § 47 (4th ed.), p. 76; *Durgan v. Redding*, 103 Fed. R. 914. But see *Whittenton v. M. & O. R. P. Co.*, 19 Fed. R. 273. It has been held that Rule 94 does not apply to a bill brought

in a State court and subsequently removed. *Earle v. Seattle L. S. & E. Ry. Co.*, 56 Fed. R. 909.

<sup>5</sup> *Perkins v. Hendryx*, 23 Fed. R. 418; *Lacroix v. Lyons*, 27 Fed. R. 403; *La Mothe Mfg. Co. v. National T. Works Co.*, 15 Blatchf. 432; *Phelps v. Elliott*, 26 Fed. R. 881; *No. Pac. R. Co. v. Paine*, 119 U. S. 561.

<sup>6</sup> *Hurt v. Hollingsworth*, 100 U. S. 100; *Lacroix v. Lyons*, 27 Fed. R. 403. *Cf.* *Ladd v. West*, 55 Fed. R. 853, 855; *In re Foley*, 76 Fed. R. 390; *M'Connell v. Provident Sav. L. Ass. Soc. (C. C. A.)*, 69 Fed. R. 113. It has been held that a plaintiff cannot, after a removal, so amend his pleading as to change a cause of action in equity for cancellation of a contract into a cause of action at law for deceit in procuring such contract. *Blalock v. Eq. Life Ass. Soc.*, 73 Fed. R. 655.



raised by a motion for a repleader<sup>7</sup> or by a demurrer.<sup>8</sup> If no repleader is then had, so much of the pleadings as presents matters not cognizable on that side of the court to which the case is removed will be stricken out or disregarded, without prejudice to its presentation in a new suit.<sup>9</sup> When the plaintiff proceeds after removal upon the wrong side of the court, the proper practice is to sustain a demurrer to his pleading, without prejudice to his right to replead on the other side of the court.<sup>10</sup> No stipulation of the parties can make the case cognizable on either side of the court to which it does not properly belong.<sup>11</sup> It has been held at Circuit, that, where the State practice permits affirmative relief by an answer without a cross-bill, an answer seeking affirmative relief filed before a removal will be sufficient, and that a cross-bill need not be filed in the Federal court.<sup>12</sup>

It has been held in the Eighth Circuit that, if the suit is of an equitable nature, the defendant's right to plead does not expire until the second rule-day after his appearance, although his answer was due when the petition for removal was filed.<sup>13</sup> In the Second and Fourth Circuits it has been said that the time for pleading in equity and at common law is suspended until the record is filed, and then begins to run again, computing with it the time which had passed in the State court before the removal;<sup>14</sup> but in the Fourth Circuit it has been held that where, before removal, the time to plead has been extended to a fixed day, which is previous to the filing of the record, the defendant should plead on the day he files the rec-

<sup>7</sup> *Whittenton Mfg. Co. v. Memphis & O. R. P. Co.*, 19 Fed. R. 273.

<sup>8</sup> *Perkins v. Hendryx*, 23 Fed. R. 418.

<sup>9</sup> *Perkins v. Hendryx*, 23 Fed. R. 418; *Lacroix v. Lyons*, 27 Fed. R. 403; *La Mothe Mfg. Co. v. Nat. T. Works Co.*, 15 Blatchf. 432; *Phelps v. Elliott*, 26 Fed. R. 881; *No. Pac. R. Co. v. Paine*, 119 U. S. 561, 563.

<sup>10</sup> *Perkins v. Hendryx*, 23 Fed. R. 418, 419; *Bacon v. Felt*, 38 Fed. R. 870. But see *Pilla v. German S. Ass'n*, 23 Fed. R. 700, 702; *Phelps v. Elliott*, 26 Fed. R. 881, 883; *Thompson v. Railroad Co.*, 6 Wall. 134, 139;

*Orton v. Smith*, 18 How. 263, 266; *McConnell v. Prov. Sav. L. Ass. Soc. (C. C. A.)*, 69 Fed. R. 113. Otherwise when the suit is begun in the Federal court. *Hirsh v. Jones*, 56 Fed. R. 137.

<sup>11</sup> *South Alabama Devel. Co. v. Orman*, 55 Fed. R. 18.

<sup>12</sup> *Detroit v. Detroit City Ry. Co.*, 55 Fed. R. 569, 575.

<sup>13</sup> *Webster v. Crothers*, 1 Dill 301.

<sup>14</sup> *Heidecker v. Red Star L. S. S. Co.*, 32 Fed. R. 706; *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, 40 Fed. R. 185.



ord.<sup>15</sup> In the Sixth Circuit the rule seems to be, that the running of the time to plead is suspended till the time fixed by the statute for the filing of the record, although the record is filed by order of the court before the statutory time.<sup>16</sup> In the District of Indiana, at common law, a pleading is in time if filed before the time fixed by a rule of the State court, whether general or special.<sup>17</sup>

The removal of the case, even when not accompanied by a special appearance, does not waive the objection that the defendant was not regularly served with process in the State court.<sup>18</sup> It has been held that a defendant properly served with process within the State cannot, after the removal, have the suit dismissed upon the ground that he was not served within that Federal district,<sup>19</sup> or remanded because neither he nor the plaintiff resides within the Federal judicial district;<sup>20</sup> and that where a motion to set aside the service had been denied by the State court it could not be renewed in the Federal court after removal without special permission.<sup>21</sup> "Wherever there is a total absence of jurisdiction over the subject-matter in the State court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the Federal court to entertain it on removal, although

<sup>15</sup> *Phanixton Co. v. Charleston B. Co.*, 65 Fed. R. 628.

<sup>16</sup> *Torrent v. S. K. Martin L. Co.*, 87 Fed. R. 727.

<sup>17</sup> *Amsden v. Norwich U. F. Ins. Soc.*, 44 Fed. R. 515.

<sup>18</sup> *Goldey v. Morning News*, 156 U. S. 518; *Wabash W. R. Co. v. Brown*, 164 U. S. 271; *Nat. Acc. Ass'n v. Spiro*, 164 U. S. 281; *supra*, § 100. It has been held that a removal waives an objection that the suit was brought in the wrong county of the State. *Hinds v. Keith*, 57 Fed. R. 10. "Where the State court has, by levy made under attachment and personal service effected before removal, properly acquired jurisdiction of the case, to the extent, at least, of being entitled to enforce its judgment against the property, the

Federal Circuit Court will not, where the non-resident defendant has voluntarily removed the cause, allow him to dismiss it as to that property on the sole ground that the court could not have acquired original jurisdiction of such property by the issue of an attachment." *Lacombe, J., in Vermilya v. Brown*, 65 Fed. R. 149, citing *N. Y., L. E. & W. R. Co. v. Estill*, 147 U. S. 591.

<sup>19</sup> *Friezen v. Allemania F. Ins. Co.*, 80 Fed. R. 840.

<sup>20</sup> *Kansas City & T. R. Co. v. Interstate L. Co.*, 37 Fed. R. 8, 5; *Burck v. Taylor*, 39 Fed. R. 581; *Uhle v. Burnham*, 42 Fed. R. 1; *Amato v. N. Pac. R. Co.*, 46 Fed. R. 561.

<sup>21</sup> *Allmark v. Platte S. S. Co.*, 76 Fed. R. 615.

in some other form it would have plenary jurisdiction over the case made between the parties.”<sup>22</sup> If after amendment the pleadings do not allege the jurisdictional facts, the suit will not be dismissed if they appear in the petition for the removal.<sup>23</sup>

After a petition and bond for a removal have been filed, the pleading cannot be so amended by a reduction of the amount involved as to defeat the jurisdiction of the Circuit Court.<sup>24</sup> It has been held that the plaintiff is estopped from claiming, upon a motion to remand, that the amount of his claim is less than alleged in his pleading in the State court; although a previous suit by him upon the same claim in the Federal court had been dismissed upon the ground that the matter in dispute was less than the jurisdictional amount.<sup>25</sup> If the amount in dispute when the suit is commenced is sufficient to authorize a removal, no subsequent event can defeat the right to remove;<sup>26</sup> provided, that the original claim was made in good faith.<sup>27</sup> After a Circuit Court of the United States has once rightfully acquired

<sup>22</sup> *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. R. 787, 789, per Hammond, J.; *Hummel v. Moore*, 25 Fed. R. 880; *Elliott v. Shuler*, 50 Fed. R. 454, 457; *Swift v. Philadelphia & R. Co.*, 58 Fed. R. 858; *Sutro v. Simpson*, 14 Fed. R. 870; *Goldstein v. New Orleans*, 38 Fed. R. 626. *Contra*, *Kelly v. Virginia P. Ins. Co.*, 3 Hughes, 449. It was held that in such a case the suit should be dismissed by the Federal court although it might have taken original jurisdiction of the same. *Auracher v. Omaha & St. L. R. Co.*, 102 Fed. R. 1.

<sup>23</sup> *Briges v. Sperry*, 95 U.S. 401; *State v. Coosaw Min. Co.*, 45 Fed. R. 804. “A removing defendant may supplement the case made by his petition by a reference to the facts which appear elsewhere in the record; but it has never been decided that he is at liberty to abandon the ground upon which his petition proceeds, and assert an inconsistent case, and it would be contrary to the spirit of the present removal act, which does not permit a plaintiff to remove a

suit, to permit a defendant to avail himself of the privilege upon the theory that the suit is brought in his interest, and he is in reality the plaintiff.” *Wallace, J., in Mayer v. Denver, T. & Ft. W. R. Co.*, 41 Fed. R. 723.

<sup>24</sup> *Kanouse v. Martin*, 15 How. 198; *Green v. Custard*, 23 How. 484; *Wright v. Wells*, 1 Pet. C. C. 220; *Roberts v. Nelson*, 8 Blatchf. 74. Where it is claimed that the amendment was prior to the removal, that question must be tried in the Federal court. *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.

<sup>25</sup> *Henderson v. Cabell*, 43 Fed. R. 257. See *La Page v. Day*, 74 Fed. R. 977.

<sup>26</sup> *Roberts v. Nelson*, 8 Blatchf. 74; *Fuller v. Met. L. Ins. Co.*, 87 Fed. R. 163. But see *Iowa H. Co. v. Des Moines N. & R. R. Co.*, 8 Fed. R. 97; *Maine v. Gilman*, 11 Fed. R. 214; *Nussbaum v. Northern Ins. Co.*, 40 Fed. R. 337.

<sup>27</sup> *Supra*, §§ 16, 293.

jurisdiction of a cause by removal or original process, an amendment bringing in new parties or a new cause of action will not ordinarily defeat the jurisdiction;<sup>28</sup> nor will a change of citizenship of either party defeat the jurisdiction after it has once attached.<sup>29</sup> It has been held that where only part of the defendants have a citizenship different from that of the plaintiff, he may, after a removal, discontinue as to them and then have the case remanded.<sup>30</sup>

The decisions of the State court, on a demurrer or otherwise, made in the case before its removal will ordinarily be followed by the Circuit Court.<sup>31</sup> If it is desired to renew a motion which the State court has denied, leave to make the application should first be applied for and obtained.<sup>32</sup> A receiver appointed by a State court may be discharged or removed by the Federal court after a removal.<sup>33</sup> Whether after removal a plea of *lis pendens*, based upon a former suit in the Federal court, should be sustained, was left undecided.<sup>34</sup> If the jurisdictional facts are not stated in the petition or other

<sup>28</sup> *Ober v. Gallagher*, 98 U. S. 199, 206; *Stewart v. Dunham*, 115 U. S. 61, 64. But see *Perry v. Clift*, 32 Fed. R. 801. See also *Texas Trans. Co. v. Seeligson*, 122 U. S. 519; *Bacon v. Felt*, 38 Fed. R. 870. cited *supra*, § 384.

<sup>29</sup> *Culver v. Woodruff*, 5 Dill. 392.

<sup>30</sup> *Bane v. Keefer*, 66 Fed. R. 610; *supra*, § 18. Where the State court had allowed the intervention of a person not named in the original pleading, and the intervenor removed the case, a remand was ordered at plaintiff's motion after he had amended his bill so as to leave nothing affecting the intervenor's rights. *Iowa H. Co. v. Des Moines, N. & R. Co.*, 8 Fed. R. 99. Where the claimant of a title paramount to the mortgage had been made a party defendant to a foreclosure, and had removed the suit, the Federal court remanded it on the ground that if retained it must be dismissed as to him. *California S. D. & Tr. Co. v. Cheney E. L. T. & P. Co.*, 56 Fed. R. 257.

<sup>31</sup> *Bryant v. Thompson*, 27 Fed. R. 881; *Loomis v. Carrington*, 18 Fed. R. 97; *Duncan v. Gegan*, 101 U. S. 810; *Milligan v. Lalance & G. Mfg. Co.*, 21 Blatchf. 407; *Bushnell v. Kennedy*, 9 Wall. 887; *Davis v. St. Louis & S. F. R. Co.*, 25 Fed. R. 786; *Cleaver v. Traders' Ins. Co.*, 40 Fed. R. 711; *Lookout Mountain R. Co. v. Houston*, 44 Fed. R. 449. But see *Spring Co. v. Knowlton*, 103 U. S. 49.

<sup>32</sup> *Carrington v. Florida R. Co.*, 9 Blatchf. 468; *Allmark v. Platte S. S. Co.*, 76 Fed. R. 615. When, however, at the time of a removal, a motion was pending to resettle an order previously made, the Circuit Court entertained the application, though it refused to review the decision upon which that order had been entered. *Milligan v. Lalance & G. Mfg. Co.*, 17 Fed. R. 465.

<sup>33</sup> *Texas & St. L. Ry. Co. v. Rust*, 17 Fed. R. 275.

<sup>34</sup> *Ahlhauser v. Butler*, 50 Fed. R. 705.

papers on the removal, an amendment stating them cannot be allowed in the Federal court.<sup>35</sup> When they were stated informally in the petition,<sup>36</sup> or in an affidavit that accompanied it,<sup>37</sup> such amendments have been allowed. An answer may be treated as an amendment to a petition.<sup>38</sup> An amendment cannot be allowed in the Supreme Court;<sup>39</sup> nor will the Supreme Court, except, perhaps, under extraordinary circumstances, reverse any judgment for the refusal of the Circuit Court to grant leave to amend.<sup>40</sup> When a case has been remanded, a second petition on the same grounds cannot be filed,<sup>41</sup> except in a case where the plaintiff has subsequently amended his pleading so as to show what did not appear before, that there is a controversy arising under the Constitution or laws of the United States.<sup>42</sup> But a removal can be made for prejudice or local influence after a case sought to be removed for difference of citizenship alone has been remanded.<sup>43</sup>

<sup>35</sup> *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240; *Jackson v. Allen*, 132 U. S. 27; *Fife v. Whittell*, 102 Fed. R. 537; *Brigham v. C. C. Thompson Lumber Co.*, 55 Fed. R. 881; *Frisbie v. Ches. & O. Ry. Co.*, 59 Fed. R. 369. But see *Freeman v. Butler*, 89 Fed. R. 4; *De Loy v. Traveller's Ins. Co. of Hartford*, 59 Fed. R. 319; *Mitchell v. Small*, 140 U. S. 406, 410; *Carr v. Fife*, 45 Fed. R. 209.

<sup>36</sup> *Johnson v. F. C. Austin Mfg. Co.*, 76 Fed. R. 616; *Stadleman v. White L. T. Co.*, 92 Fed. R. 209; *Tremper v. Schurbacher*, 84 Fed. R. 413; *Ayers v. Watson*, 113 U. S. 594, 598; *Carson v. Dunham*, 121 U. S. 421; *Powers v. Ches. & O. Ry. Co.*, 65 Fed. R. 129; *Robertson v. Scottish U. & Nat. Ins. Co.*, 68 Fed. R. 173. But see *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240; *Winnemans v. Edgington*, 27 Fed. R. 324, 326; *Freeman v. Butler*, 89 Fed. R. 1; *Jackson v. Allen*, 132 U. S. 27. It has been held that after the time to remove has expired, the State court may allow the petition to be amended by inserting the allegation that the citizenship of the parties was the same when the suit was begun as when the petition was filed.

*Roberts v. Pac. & A. Ry. & Nav. Co.*, 104 Fed. R. 577. And that a petition and bond and order for removal may be amended in the Circuit Court of the United States so as to correct a mistake through which the defendant asked a removal to the District Court of the United States. *Hadfield v. N. W. Life Assur. Co.*, 105 Fed. R. 530.

<sup>37</sup> *Hall v. Chattanooga Agr. Works*, 48 Fed. R. 599, 605.

<sup>38</sup> *Carson v. Dunham*, 121 U. S. 421. A petition subsequently presented to the Federal court, it was held, could not be treated as an amendment. *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.

<sup>39</sup> *Cameron v. Hodges*, 127 U. S. 322.

<sup>40</sup> *Ayers v. Watson*, 137 U. S. 584, 585. But see *Riddle v. Whitehill*, 135 U. S. 621, 627.

<sup>41</sup> *St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 217; *Johnston v. Donovan*, 30 Fed. R. 395; s. c., 24 Blatch. 274; *Smith v. Travelers' Ins. Co.*, 73 Fed. R. 513. But see *Freeman v. Butler*, 89 Fed. R. 1, 6.

<sup>42</sup> *Bailey v. Mosher*, 95 Fed. R. 223.

<sup>43</sup> *Birdseye v. Shaeffer*, 37 Fed. R. 821.

It has been held at Circuit that, after the time for a removal has expired, a bond previously filed can be amended, or a new bond substituted to remedy an error or informality,<sup>44</sup> such as an error in the name of the obligee; but not as regards an error of substance, such as the omission of any sum in the penal clause,<sup>45</sup> or the omission of the provision for the payment of costs;<sup>46</sup> and that an order allowing a bond to be filed *nunc pro tunc*, as of the date of the filing of the petition, cannot be granted after the time for removal has expired.<sup>47</sup> Upon the removal the State court loses all jurisdiction, and cannot even enter a judgment for costs after a reversal with costs by the Supreme Court of the United States of a judgment entered after the petition and bond had been duly filed. Such costs must be recovered in the Federal court.<sup>48</sup>

The Federal court may but rarely will after removal enjoin the State court from proceeding in the suit,<sup>49</sup> even, it has been held, when the State is the plaintiff.<sup>50</sup> The Supreme Court of the United States will not grant a writ of prohibition to prevent a State court from proceeding in a suit after its removal.<sup>51</sup>

A party does not waive his removal proceedings by taking a subsequent proceeding in a State court, such as a motion for a continuance, when the State court has claimed to still retain its jurisdiction,<sup>52</sup> nor by defending upon a trial,<sup>53</sup> nor by argument in opposition to an appeal from the order of removal which is reversed.<sup>54</sup> It has been held that a land-owner waives his re-

<sup>44</sup> *Harris v. Delaware, L. & W. R. Co.*, 18 Fed. R. 838; *Beede v. Cheeney*, 5 Fed. R. 388; *Deford v. Mehaffy*, 13 Fed. R. 481.

<sup>45</sup> *Austin v. Gagan*, 39 Fed. R. 626; *Burdick v. Hale*, 7 Biss. 96.

<sup>46</sup> *Torrey v. Grant L. Works*, 14 Blatchf. 269; *Webber v. Bishop*, 12 Fed. R. 49. *Contra*, *Deford v. Mehaffy*, 13 Fed. R. 481.

<sup>47</sup> *Austin v. Gagan*, 39 Fed. R. 626.

<sup>48</sup> *Nat. S. S. Co. v. Tugman*, 67 Fed. R. 16.

<sup>49</sup> *Abeel v. Culbertson*, 56 Fed. R. 329; *Wagner v. Drake*, 31 Fed. R. 849; *Baltimore & O. R. Co. v. Ford*, 35 Fed. R. 170. But see *Sinclair v. Pierce*, 50 Fed. R. 851; *supra*, §§ 211, 223.

<sup>50</sup> *Abeel v. Culbertson*, 56 Fed. R. 329. But see *supra*, § 87.

<sup>51</sup> *Chesapeake & O. R. Co. v. White*, 111 U. S. 184.

<sup>52</sup> *Baltimore & O. R. Co. v. Ford*, 35 Fed. R. 170; *Richards v. Rock Rapids*, 31 Fed. R. 505; *State v. Sullivan*, 50 Fed. R. 592; *McMullen v. Northern Pac. R. Co.*, 57 Fed. R. 16; *Insurance Co. v. Dunn*, 19 Wall. 214. Note even, it has been held, a stipulation to plead and try the case at the next term. *Waite v. Phoenix Ins. Co.*, 62 Fed. R. 769.

<sup>53</sup> *Removal Cases*, 100 U. S. 457; *Insurance Co. v. Dunn*, 19 Wall. 214.

<sup>54</sup> *Mecke v. Valley T. M. Co.*, 39 Fed. R. 209, 211.

moval of condemnation proceedings by contemporaneously obtaining from the State Supreme Court a *certiorari* to remove the record thereto for review.<sup>55</sup>

§ 392. Effect of removal.—The statute prescribes as follows concerning the effect of a removal: “That when any suit shall be removed from a State court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.”<sup>1</sup> The Act of 1875 provided that upon a removal “any bail that may have been previously taken shall be discharged.” This clause is repealed by the Act of 1887, and such bail is now, therefore, a security which remains in force. It has been held at Circuit that an attachment levied in the State court, in accordance with the statutes of the State, on the property of a non-resident, who has not been served with process personally, will be upheld and enforced by the Federal court after removal, although the Federal court had no jurisdiction to levy such an attachment originally.<sup>2</sup> A Federal court may make an order continuing an injunction granted by a State court before the removal, which the State court had no power to grant.<sup>3</sup> A stipulation made before removal may be

<sup>55</sup> *Hudson River R. R. & T. Co. v. Day*, 54 Fed. R. 545.

§ 392. <sup>1</sup> Sec. 4 of Act of March 3, 1875 (18 St. at L., ch. 187, p. 470), as amended in Act of March 3, 1887 (24 St. at L., ch. 373).

<sup>2</sup> *Crocker Nat. Bank v. Pengensteher*, 44 Fed. R. 705; *Vermilya v. Brown*, 65 Fed. R. 149.

<sup>3</sup> *Hower v. Weiss M. & G. El. Co.*,

55 Fed. R. 356. It has been said that the Federal court may continue an injunction granted by the State court which could not have been originally granted by a court of the United States. *Eureka & K. R. Co. v. California & N. Ry. Co.*, 103 Fed. R. 897. See *Hunt v. Fisher*, 29 Fed. R. 801.



enforced afterward.<sup>4</sup> It has been held at Circuit that after removal a sheriff cannot amend his return previously made to the State court;<sup>5</sup> and that the Federal court may authorize its marshal to take into his custody property held by the sheriff under a writ of the State court issued before the removal.<sup>6</sup> A receiver appointed before the removal of the case remains in possession until himself removed, and may be required to account in the Federal court.<sup>7</sup> The Federal court may remove or discharge a receiver appointed by the State court before the removal.<sup>8</sup> It has been held at Circuit that the Federal court cannot after removal punish a party for his violation, before the removal, of an order of the State court.<sup>9</sup> It seems that an order of the State court for the examination of a party after issue and before trial under section 870 of the New York Code of Civil Procedure must be vacated after removal by the Federal court.<sup>10</sup> It was held at Circuit, in a case where, before the removal, a deposition had been taken down in shorthand, but not signed, that the Federal court could not compel the witness to sign the deposition.<sup>11</sup> A removal operates as an

<sup>4</sup> *Phelps v. Canada Cent. R. Co.*, 19 Fed. R. 801.

<sup>5</sup> *Tallman v. Baltimore & O. R. Co.*, 45 Fed. R. 156. See *Stephens v. St. Louis & S. F. R. Co.*, 47 Fed. R. 530. *Contra*, *Richmond v. Brookings*, 48 Fed. R. 241. It has been held: that the sheriff's return cannot be contradicted as to matters of which he must have personal and official knowledge as to manner and date of service, *Forrest v. Union Pac. R. Co.*, 47 Fed. R. 1, 2; but that his return may be contradicted as to other matters, as the fact whether the person served was agent of a corporation, *Tallman v. Baltimore & O. R. Co.*, 45 Fed. R. 156; *Forrest v. Union Pac. R. Co.*, 47 Fed. R. 1, 2; and that the record of the State court may be proved by oral evidence to be erroneous. *Stephens v. St. Louis & S. F. R. Co.*, 47 Fed. R. 530.

<sup>6</sup> *Friedman v. Israel*, 20 Fed. R. 801. See *Dennistoun v. Draper*, 5 Blatchf. 336.

<sup>7</sup> *Hinckley v. Railroad Co.*, 100 U. S. 153; *Mack v. Jones*, 81 Fed. R. 189, 196.

<sup>8</sup> *Texas & St. L. Ry. Co. v. Rust*, 17 Fed. R. 275.

<sup>9</sup> *Kirk v. Milwaukee D. C. Mfg. Co.*, 26 Fed. R. 501. But see *Williams, M. & R. Co. v. Raynor*, 7 Biss. 245.

<sup>10</sup> *Ex parte Fisk*, 118 U. S. 713. See *Pierce v. Union Pac. Ry. Co.*, 47 Fed. R. 709; and *supra*, § 372. But see 27 St. at L. 7. For a case where depositions taken before a removal were not admitted, see *Texas & Pac. Ry. Co. v. Wilder (C. C. A.)*, 92 Fed. R. 953. When a motion is made by a defendant in a State court after he has filed a petition for removal to the Federal court, and is afterwards brought on in the Federal court, the irregularity is waived by the plaintiff by seeking an adjournment without raising the objection. *Kinne v. Lant*, 68 Fed. R. 486.

<sup>11</sup> *Arnold v. Kearney*, 29 Fed. R. 820.

abandonment of an appeal from an interlocutory order not appealable in the Federal court.<sup>12</sup> A removal is analogous to a change of venue, not to an appeal.<sup>13</sup>

§ 393. Remand.—The statute provides: “That if, in any suit commenced in a Circuit Court, or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.”<sup>1</sup> A case which was properly removed cannot be remanded by consent.<sup>2</sup> A remand for want of jurisdiction may be made at the motion of the party who removed the case.<sup>3</sup> Such a motion may be made after a verdict,<sup>4</sup> or it seems after judgment against the moving party;<sup>5</sup> or the judgment may be reversed and a remand ordered upon an appeal by the party who removed the cause.<sup>6</sup> In a case where, after overruling a motion to remand a cause which had been removed on the ground that a plea raised a Federal question, a demurrer to the plea was sustained; it was then held that there was no longer any Federal question in the case, and a second motion to remand was granted.<sup>7</sup>

<sup>12</sup> Freeman v. Butler, 89 Fed. R. 1.

<sup>13</sup> Davis v. St. Louis & S. F. Ry. Co., 25 Fed. R. 786, 787, per Brewer, J. It has been held in Ohio that when a suit removed from a court of the State to a Federal court has been dismissed by the latter for want of prosecution, the plaintiff cannot begin a second suit for the same cause of action in the State court. Baltimore & O. R. Co. v. Fulton, 59 Ohio St. 575, 53 N. E. R. 265. But see a criticism of this decision by Mr. James McCabe in 60 Alb. L. J. 171.

§ 393. <sup>1</sup> 18 St. at L. 472, ch. 187, § 5. See *supra*, § 243.

<sup>2</sup> Lawton v. Blitch, 30 Fed. R. 641.

<sup>3</sup> Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379; Lazensky v. Knights of Honor, 82 Fed. R. 417; Ferguson v. Ross, 88 Fed. R. 161.

<sup>4</sup> Ferguson v. Ross, 88 Fed. R. 161. But see Davies v. Lathrop, 18 Fed. R. 565.

<sup>5</sup> Lazensky v. Knights of Honor, 82 Fed. R. 417.

<sup>6</sup> Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379.

<sup>7</sup> Hamblin v. Chicago, B. & Q. R. Co., 48 Fed. R. 401. But see Omaha H. Ry. Co. v. Cable T. Co. of Omaha, 82 Fed. R. 727. See § 293.

It has been said that when the jurisdiction of the Federal court is doubtful, the cause should be remanded.<sup>8</sup> Where part of the suit was not removable, and it seems that another part, if separately prosecuted, might have been removed, the Federal court remanded the entire case.<sup>9</sup>

In a case where the remand was made after a verdict against the removing party, no costs were imposed.<sup>10</sup> In the Supreme Court, when a judgment or decree is reversed for want of jurisdiction, costs are imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.<sup>11</sup>

The costs imposed upon a remand are the docket fee of \$20 and such taxable disbursements as have been incurred in the Federal court;<sup>12</sup> but not disbursements incurred in the State court after the petition for removal was filed.<sup>13</sup>

A delay of a year after the filing of a petition for a removal before a motion to remand has been held a waiver of the objection that such petition was filed too late;<sup>14</sup> but it has been held that the court may of its own motion remand a suit on this ground,<sup>15</sup> and delay does not waive a jurisdictional defect.<sup>16</sup> After abatement a suit cannot be remanded until it is revived.<sup>17</sup>

<sup>8</sup> *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. R. 812, 820; *Hutcheson v. Bigbee*, 56 Fed. R. 829; *Johnson v. Wells, F. & Co.*, 91 Fed. R. 1; *Plant v. Harrison*, 101 Fed. R. 807.

<sup>9</sup> *Ladd v. West*, 55 Fed. R. 353, 355. But see *Sharkey v. Port B. M. Co.*, 92 Fed. R. 425; *s. c.* (C. C. A.), 102 Fed. R. 259; *Hoge v. Canton Ins. Office*, 108 Fed. R. 518; *supra*, § 888.

<sup>10</sup> *Ferguson v. Ross*, 38 Fed. R. 161.

<sup>11</sup> *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237; *Peper v. Fordyce*, 119 U. S. 469; *Everhart v. Huntsville College*, 120 U. S. 223; *King Bridge Co. v. Otoe County*, 120 U. S. 225; *Chapman v. Barney*, 129 U. S. 677; *Peninsular L. Co. v. Stone*, 131 U. S. 631.

<sup>12</sup> *Josslyn v. Phillips*, 27 Fed. R. 481. In the absence of a stipulation in the bond to that effect, the court cannot

in its order of remand direct the entry of judgment against the surety. *Colburn v. Hill* (C. C. A.), 103 Fed. R. 840.

<sup>13</sup> *Young v. Merchants' Ins. Co.*, 29 Fed. R. 273.

<sup>14</sup> *Miller v. Kent*, 18 Fed. R. 561; *Baltimore & O. R. Co. v. Ford*, 35 Fed. R. 170; *Wyly v. Richmond & D. R. Co.*, 63 Fed. R. 487. Nor for the first time upon appeal. *Knight v. International & G. N. Ry. Co.* (C. C. A.), 61 Fed. R. 87.

<sup>15</sup> *Bowers v. Supreme Council Am. L. of H.*, 45 Fed. R. 81.

<sup>16</sup> *Jackson v. Allen*, 132 U. S. 27; *Lazensky v. Knights of Honor*, 32 Fed. R. 417; *Ferguson v. Ross*, 38 Fed. R. 161; *Bronson v. St. Croix L. Co.*, 35 Fed. R. 634; *Southworth v. Reid*, 36 Fed. R. 451.

<sup>17</sup> *Wright v. Phipps*, 58 Fed. R. 552. A case cannot be remanded by con-

The better practice, if it is intended to deny any of the allegations in the petition for a removal, is to file a plea in abatement;<sup>18</sup> but it seems that this is not indispensable, provided a traverse in some form is made.<sup>19</sup> When any allegation in the petition is denied, the burden of proof rests on the petitioner.<sup>20</sup>

On a motion to remand the court will not inquire as to the truth of the allegations in the pleadings,<sup>21</sup> or into the sufficiency of the allegations in the complaint or bill as such, or as to whether the complaint or bill contains a good cause of action, or the answer a good defense,<sup>22</sup> except, when it is claimed that a Federal question is involved, so far as to see whether a Federal question is actually raised.<sup>23</sup> Neither the State nor the Federal court should deny a removal upon the ground simply that the averments of the pleading are "insufficient, or too vague to justify a court of equity in granting the relief asked."<sup>24</sup> When the suit is "in its general nature one of which the Circuit Court of the United States could rightfully take cognizance," it is for that court, after the case is docketed there and on final hearing, to determine whether the allegations and proof are sufficient. All questions of this sort must be tried in the Federal court.<sup>25</sup>

The Act of March 3, 1887, provides that "no appeal or writ of error to the decision of the Circuit Court remanding a cause

sent. *Lawton v. Blich*, 80 Fed. R. 641.

<sup>18</sup> *Clarkhuff v. Wisconsin, I. & N. R. Co.*, 26 Fed. R. 465; *Lacroix v. Lyons*, 27 Fed. R. 403; *Rumsey v. Call*, 28 Fed. R. 769; *Carson v. Dunham*, 121 U. S. 421; *M'Donald v. Salem C. F. M. Co.*, 81 Fed. R. 577; *Johnson v. Accident Ins. Co. of N. A.*, 85 Fed. R. 374; *Imperial Refining Co. v. Wyman*, 88 Fed. R. 574. The consolidation of a case does not prevent its remand. *Colburn v. Hill (C. C. A.)*, 101 Fed. R. 500.

<sup>19</sup> *Beadleston v. Harpending*, 82 Fed. R. 644; *Anderson v. Appleton*, 82 Fed. R. 855; *Morris v. Gilmer*, 129 U. S. 815; *Curnow v. Phoenix Ins. Co.*, 44 Fed. R. 805.

<sup>20</sup> *Carson v. Dunham*, 121 U. S. 421, 425. It has been said that the court will take judicial notice of the fact that one of the parties is a receiver appointed by it. *Pitkin v. Cowen*, 91 Fed. R. 599, 600. See *supra*, § 61.

<sup>21</sup> *Marshall v. Holmes*, 141 U. S. 589, 591; *Hax v. Caspar*, 81 Fed. R. 499.

<sup>22</sup> *Ibid.*

<sup>23</sup> See *supra*, §§ 17, 385a, note.

<sup>24</sup> *Marshall v. Holmes*, 141 U. S. 589, 601.

<sup>25</sup> *Stone v. South Carolina*, 117 U. S. 430; *Burlington, C. R. & N. Ry. Co. v. Dunn*, 122 U. S. 518; *Kansas City, F. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 303. But see *Beadleston v. Harpending*, 82 Fed. R. 644.

shall be allowed.”<sup>26</sup> It has been held that the Evarts Act of March 3, 1891, does not authorize an appeal from or writ of error to the order of a Circuit Court<sup>27</sup> or of a Circuit Court of Appeals<sup>28</sup> remanding a cause; and that there can be no review of the same by writ of error to the final judgment of the highest court of the State in which a decision could be had.<sup>29</sup> Such a decision cannot be reviewed by mandamus.<sup>30</sup> No writ of error nor appeal can be taken from or to an order denying a motion to remand before final judgment or decree.<sup>31</sup>

<sup>26</sup> 24 St. at L. 552.

<sup>27</sup> *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556.

<sup>28</sup> *German Nat. Bank v. Speckert*, 181 U. S. 405.

<sup>29</sup> *Chicago, St. P., M. & O. Ry. Co. v. Roberts*, 141 U. S. 690. *Cf. Gurnee v. Patrick County*, 187 U. S. 141.

<sup>30</sup> *In re Pennsylvania Co.*, 187 U. S. 451.

<sup>31</sup> *Patten v. Cilley*, 50 Fed. R. 837;

s. c., 1 C. C. A. 523; s. c., 5 U. S. App. 2. *Cf. supra*, § 363. It is for the State court to determine what shall be done with depositions taken in the Federal court before a remand. *Broadway Ins. Co. v. Chicago G. W. Ry. Co.*, 101 Fed. R. 507. The Federal court cannot, after discovering the defect in its jurisdiction, confirm a sale previously made. *Colburn v. Hill* (C. C. A.), 103 Fed. R. 840.

## CHAPTER XXX.

### PRACTICE IN ADMIRALTY.

BY CHARLES C. BURLINGHAM, *of the New York Bar.*

§ 394. Libel.—The first step in an admiralty suit is the filing of the libel with the clerk of the District Court. Until this is done process will not issue.<sup>1</sup> The form of the libel varies in the several districts with the methods of pleading adopted in the respective States, not by force of any rule of law or statute, but by a natural process of adaptation. The Supreme Court, in its Admiralty Rules, has, however, laid down certain positive rules of pleading. The libel must state the nature of the cause of action, whether of contract, tort, or damage, salvage, or possession, or otherwise, as the case may be. It should allege that the cause is within the admiralty and maritime jurisdiction of the United States and of the court.<sup>2</sup> If the proceeding is *in rem*, the libel must allege that the property proceeded against is within the district.<sup>3</sup> If *in*

§ 394. <sup>1</sup> Adm. Rule 1.

<sup>2</sup> Adm. Rule 23. It is the safer practice to allege specifically that the waters where the cause of action arose are navigable. But see *Lands v. A Cargo of Two Hundred and Twenty-seven Tons of Coal*, 4 Fed. R. 478; *supra*, §§ 106, 264.

<sup>3</sup> Adm. Rule 23. This does not oust the court of jurisdiction where the vessel was within the district when the libel was verified, departs before it is filed, returns after the filing, and is then seized on an alias monition. *The Queen of the Pacific*, 61 Fed. R. 213; s. c., *Bancroft-Whitney Co. v. The Queen*, 78 Fed. R. 155. A libel filed to enforce a lien which did not then exist was sustained after the lien came into existence. *Clark v. Five Hundred and Five Thousand*

*Feet of Lumber (C. C. A.)*, 65 Fed. R. 236; s. c., 70 Fed. R. 1020.

As to jurisdiction in proceedings to limit liability, see *In re Leonard*, 14 Fed. R. 53; *infra*, §§ 434, 437. A corporation may be sued *in personam* in any district where process can be served upon it. *In re Louisville Underwriters*, 134 U. S. 488. But it has been held that in the Western District of Missouri suits *in personam* can only be brought in the division where the respondent resides if he is a resident of the district; and suits *in rem* only in the division where the property is situated. *The L. B. X*, 88 Fed. R. 290. An appearance, the procurement of the release of the vessel by filing a stipulation, and the transfer of the suit to the division of the claimant's residence, were held



*personam*, it must set forth the names, occupations, and places of residence of the parties.<sup>4</sup> In its substantial, as distinguished from formal, allegations the libel follows the analogies of equity. It should "propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."<sup>5</sup> The prayer for relief should specify the form

to constitute a waiver of a similar objection. *The Willamette* (C. C. A.), 70 Fed. R. 874. A court of admiralty may, in its discretion, refuse to entertain a suit between foreigners where the cause of action arose elsewhere. *Neptune S. Nav. Co. v. Sullivan Timber Co.*, 37 Fed. R. 159. Thus, it may refuse to take jurisdiction of a suit for wages by foreign seamen against a foreign ship when the result would be a detention of the vessel and the sailors' employment has not terminated. *Slocum v. Western Assurance Co.*, 42 Fed. R. 235. A District Court has, however, taken jurisdiction of a suit against a foreign vessel by a foreigner to recover for a tort committed upon the high seas. *The Noddleburn*, 28 Fed. R. 855; *s. c.*, 30 Fed. R. 142. And of a suit by a non-resident citizen of the United States to recover upon a policy of marine insurance executed in a foreign country by an alien corporation. *Slocum v. Western Assur. Co.*, 42 Fed. R. 235.

As to jurisdiction of suits for negligence which caused the death of the libelant's testator or intestate, see *The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201; *The Car Float* (C. C. A.), 61 Fed. R. 364; *The Glendale v. Evich* (C. C. A.), 81 Fed. R. 633; *The Willamette* (C. C. A.), 70 Fed. R. 874; *The E. B. Ward*, 17 Fed. R. 456; *The Wydale*, 37 Fed. R. 716; *Humboldt L. Mfg. Ass'n v. Christopher* (C. C. A.), 73 Fed. R. 239; *The City of Norwalk*, 55 Fed. R. 98; *Jef-*

*fries v. De Hart* (C. C. A.), 102 Fed. R. 765; *Rundell v. La Compaigne Generale* (C. C. A.), 100 Fed. R. 655.

As to the boundaries of the Southern District of New York and the District of New Jersey, see *In re Devoe Mfg. Co.*, 108 U. S. 401; *The Sarah E. Kennedy*, 25 Fed. R. 569; *The Norma*, 32 Fed. R. 411. As to the extent of the jurisdiction of the Eastern District of Virginia, see *Aitcheson v. The Endless Chain Dredge*, 40 Fed. R. 253.

<sup>4</sup> Admiralty Rule 23. See *infra*, § 438.

<sup>5</sup> Adm. Rule 23. Naming the libelant by the initials of his Christian name was held not to be a defect in the libel. *Hardy v. Moore*, 4 Fed. R. 843. Where a party is a corporation, that fact should be stated in the libel. *Sun Mut. Ins. Co. v. Mississippi V. Tr. Co.*, 14 Fed. R. 699. Where the cause of action arises from a written contract it has been said that the contract should be annexed to the libel or a legal excuse given for its omission. *Sun Mut. Ins. Co. v. Mississippi V. Tr. Co.*, 14 Fed. R. 699; *Card v. Hines*, 33 Fed. R. 189. But see *Chamberlain v. The Torgorm*, 46 Fed. R. 202. A libel *in personam*, for a collision or other tort, should state specifically that the respondent was the owner or in control of the vessel at the time when the libelant was injured. *The Corsair*, 145 U. S. 335; *Danace v. The Magnolia*, 37 Fed. R. 367. As to what is a sufficient allegation of negligence

of process sought.<sup>6</sup> The libel should be verified. If the libelant is absent from the district, his agent or attorney may verify it.<sup>7</sup> In suits brought in behalf of the United States, the United States attorney files a libel of information, or, as it is usually termed, an information, which is subject to the same rules as a libel.<sup>8</sup> It need not, however, be verified.

§ 395. Security for libelant's costs.—The Supreme Court Rules do not expressly require any security to be given by the libelant for costs; but in many of the districts process will not issue until the libelant has filed with the clerk a stipulation for costs.<sup>1</sup> This is conditioned to pay all costs and expenses which shall be awarded against the libelant by the court, or, in case of an appeal, by the appellate court. In the New York districts and in New Jersey the stipulation is for \$250 in suits

by the master, see *The Anaces*, 98 Fed. R. 240.

As to the insufficiency of allegations showing that the libelant had an interest in the property injured which entitled him to recover, see *Minturn v. Alexandre*, 5 Fed. R. 117. For what is required to identify goods that have been damaged, see *The Anchoria*, 9 Fed. R. 840. A libel for damages because of a breach of a contract should point out the manner in which any special damages that are claimed arose. *The Oscoda*, 66 Fed. R. 347. But ordinarily there is no objection to the recovery by the libelant of more damages than his libel claims. *The Gazelle*, 128 U. S. 474. And under a libel *in rem* upon a contract of affreightment to recover for a cargo destroyed in extinguishing a fire, the libelant was allowed to shift his claim to a demand for general average. *Deming v. The Rapid Transit*, 52 Fed. R. 320, citing *Dupont de Nemours v. Vance*, 19 How. 162. But it has been held: that there can be no recovery for tort upon a libel which sets up an express contract only. *Hays v. Pittsburgh G. & B. Packet Co.*, 33 Fed. R. 552. That upon a libel *in rem* by laborers claiming wages they cannot

recover for services as salvors or lightermen. *The Sarah E. Kennedy*, 29 Fed. R. 264. That unless the libel is amended wages cannot be recovered for services performed at a date prior to that alleged in the libel. *Pinkham v. Rutan*, 81 Fed. R. 496. That demurrage for detention subsequent to the filing of the original libel may in a proper case be recovered under a supplemental libel. *Eight Hundred and Forty-one Tons of Ore*, 25 Fed. R. 864. And that when a penalty is demanded against a vessel upon grounds not set forth in the libel, the demand will be ignored. *The Pope Catlin*, 31 Fed. R. 408.

<sup>6</sup> Adm. Rule 23.

<sup>7</sup> But see *Tibbol v. The Marion*, 79 Fed. R. 104. As to signature by the libelant or his attorney, see *Hardy v. Moore*, 4 Fed. R. 843.

<sup>8</sup> Adm. Rule 22.

§ 395. <sup>1</sup>See *Raymond v. La Compagnie Generale*, 90 Fed. R. 105; *Rawson v. Lyon*, 15 Fed. R. 831. As to an increase of the security see *The Brig Harriet*, Fed. Cas. 6,006; *The Bark Laurens*, Abb. Adm. 302. An informer who is not suing in discharge of his duty as a public officer must give security for costs. *The Steamboat Planter*, Newb. Adm. 262.

*in rem*, and for \$100 in suits *in personam*. In Connecticut the stipulation is for \$150 in all cases. Stipulations are executed by the libelant and one surety, who must reside in the State within which the district is situated. If, however, the libelant is a non-resident, he must, at least in the Southern District of New York, furnish two sureties.<sup>2</sup> Seamen suing for wages for services on board American vessels, and salvors coming into port in possession of the property libeled, are not required to give security in the first instance, but may be required to do so for adequate cause after the arrest of the property.<sup>3</sup> No security is required of the United States in its proceedings, as costs are not allowed against the government.<sup>4</sup> Suits may be brought *in forma pauperis* upon application to the court.

§ 396. Parties.—Persons entitled to participate in the recovery, but not made parties in the original libel, may, upon petition, be allowed to join in a suit as co-libelants on such terms as the court deems reasonable. Seamen claiming wages for the same voyage are not permitted to prosecute separate suits. Those not included in the original libel should petition to be made co-libelants. If they file a second libel, they will be denied costs in case of recovery, and suits so brought will be consolidated, on motion. So, suits for salvage arising out of services participated in by several vessels will be consolidated in one suit.

A libel may be filed against more than one vessel. Thus, in a cause of collision, the owner of the damaged vessel might properly proceed against the tug which had it in tow and a third vessel. So, different interests may be proceeded against in the same suit, as, for example, in a cause of salvage, the vessel salvaged, her cargo, and her freight moneys.<sup>1</sup>

§ 397. Mesne process — Joinder of process in *rem* and in *personam*.—The process issued in pursuance of the prayer of the libel is either *in rem* or *in personam*. A joinder of the two forms of proceeding is sometimes permitted, as in a cause of

<sup>2</sup> S. D. N. Y., Rule 25.

<sup>3</sup> S. D. N. Y., Rule 8.

<sup>4</sup> *The Antelope*, 12 Wheat. 546.

§ 396. <sup>1</sup> A libel was sustained when filed under a bill of lading against the charterer and another to whom a bill of lading had been transferred,

to recover freight earned thereunder, and seeking recovery in the alternative against one or the other of them, stating that the libelant was unable to determine which is liable. *Neall v. Curran*, 93 Fed. R. 831.

collision against a ship and her master. The decisions of the several districts are not uniform on this question. In some it is held that the Rules of the Supreme Court (12 to 19) which prescribe the form of proceeding in certain specified cases are exclusive, so that where a joinder is not expressly permitted by the rules it cannot be had.<sup>1</sup> In other districts, a joinder has been sustained in cases not provided for by the Supreme Court Rules.<sup>2</sup>

§ 398. **Process in rem.**—If process *in rem* is prayed for, the clerk issues a monition, returnable on a day named, which recites the filing of the libel and its prayer for relief, and directs the marshal to arrest the property proceeded against, describing it, and cites all persons interested therein to appear on the return day<sup>1</sup> and answer the libel. The monition should be delivered to the marshal, who must thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and cause public notice thereof, and of the time assigned for the return of process, to be given in the newspaper within the district designated by the court.<sup>2</sup> By the notice all persons claiming any interest in the property attached are notified that they must present their claims on the return day, or their default will be taken and the property condemned.<sup>3</sup>

§ 399. **Cases in which the res cannot be arrested.**—The public vessels or other property of the United States<sup>1</sup> or of a foreign sovereignty are exempt from seizure in admiralty;<sup>2</sup>

§ 397. <sup>1</sup>The *Alida* (C. C. E. D. Pa.), 12 Fed. R. 843.

<sup>2</sup>The *Monte A.* (S. D. N. Y.), 12 Fed. R. 831. Where a libel against the vessel and owner contained no prayer for monition and personal judgment and no service of monition or attachment of the property was made upon the owner, it was held that his appearance to answer the libel *in rem* gave the court no authority to enter personal judgment against him. The *Ethel* (C. C. A.), 66 Fed. R. 340.

§ 398. <sup>1</sup>In the Southern District of New York, Tuesday is the return day; in the Eastern District it is Wednesday; in New Jersey, Monday.

<sup>2</sup>Adm. Rule 9.

<sup>3</sup>In the Southern District of New

York the notice is published by the marshal every day except Sunday for fourteen days prior to the return of process, unless the claim is for less than \$50, in which case only three days' publication is necessary.

Rules 12, 13, 14, 15, 16, 17, 18, 19 and 20 direct when libels shall be *in rem* and when they shall be *in personam*. It has been held that a libel cannot be sustained *in rem* for an injury which resulted in a loss of life, when the law of the State where the injury occurred authorized such a suit at common law, but did not provide for a lien. The *Corsair*, 145 U. S. 835.

§ 399. <sup>1</sup>The *Fidelity* (Waite, C. J.), 16 Blatchf. 569.

<sup>2</sup>At least if in the care of such for-

also vessels which are the property of a State or municipal corporation, or a department thereof, and are devoted to public uses.<sup>3</sup>

Where property is in the possession of the United States government, as, for example, in bonded warehouse or elsewhere in the custody, actual or constructive, of the collector of customs, it is irrepleviable, and subject only to the orders and decrees of the Federal courts.<sup>4</sup> The marshal is permitted to make the attachment without taking the property into his custody by leaving with the collector or person in charge of the property a copy of the monition, and also a notice requiring such person to detain the property in custody until the further order of the court.<sup>5</sup> He cannot take actual possession of the property without the express order of the court.<sup>6</sup>

Property actually in the custody of a sheriff cannot be attached by the marshal.<sup>7</sup> But the possession of a sheriff will not defeat the operation of the laws of the United States imposing forfeiture for the wrongful act of the owner or person in charge of a vessel.<sup>8</sup>

Canal boats cannot be libeled for wages.<sup>9</sup> But whatever the form of a vessel may be, if she is not engaged in navigating canals she is not a canal boat within the meaning of the statute.<sup>10</sup>

§ 400. Process in personam.—In suits *in personam*, the process issued is either a simple citation,<sup>1</sup> which is in the nature of a summons to appear and answer, or a citation with clause of foreign attachment. The latter directs the marshal to cite the party proceeded against to appear on the return day,<sup>2</sup> and, if he cannot be found, to attach his goods and chattels, describ-

sign government. *Long v. The Tampico & Progresso*, 16 Fed. R. 491.

<sup>3</sup> *The Protector*, 20 Fed. R. 207; *The F. C. Latrobe*, 28 Fed. R. 877.

<sup>4</sup> U. S. R. S., § 934; *The Conqueror*, 49 Fed. R. 99; *In re Fassett*, 142 U. S. 479.

<sup>5</sup> *U. S. v. One Case of Silk*, 4 Ben. 526. *Contra*, Op. of Atty. Gen., Feb. 24, 1888, vol. xix, p. 101.

<sup>6</sup> *The Conqueror*, 49 Fed. R. 99.

<sup>7</sup> *Taylor v. Carryl*, 20 How. 583; *supra*, § 7.

<sup>8</sup> *U. S. v. The Reindeer*, 2 Cliff. 57.

<sup>9</sup> U. S. R. S., § 4251.

<sup>10</sup> *Smith v. Canal Boat Wm. L. Norman*, 49 Fed. R. 285.

§ 400. <sup>1</sup> The words "citation" and "monition" are used in the Supreme Court Rules interchangeably, but it is usual to confine citation to process *in personam*, and monition to process *in rem*.

<sup>2</sup> In the New York districts, process *in personam* may be served at any time not less than three days before the return day.

ing them, and if such property cannot be found, his credits and effects.<sup>3</sup> This process will not issue for a sum not exceeding five hundred dollars, unless by the special order of the court upon proof of its propriety.<sup>4</sup> In case of foreign attachment the marshal serves the citation upon the garnishee, and if he finds goods or chattels of the respondent in the hands of the garnishee, he takes them into his own possession. If credits only are found, they are held by the garnishee "to answer the exigency of the suit."<sup>5</sup>

Although the Supreme Court Rules still contain a provision for warrants of arrest of the person, such process cannot be issued by courts of the United States in States where imprisonment for debt has been abolished, and arrests of the person are now dependent upon the laws for similar arrests in the respective States.<sup>6</sup>

§ 401. Return of process and defaults.—On the return day, the marshal having returned the monition to the clerk with proof that he has seized the property and made due publication, proclamation is made in open court, and, if no one appears to claim the property, the libellant is entitled to a decree by default. In suits *in personam*, if the respondent, when served with the citation, fails to appear, his default is taken in the same way. So, in cases of foreign attachment, where goods and chattels have been attached, the default of the respondent may be taken. Where the property attached consists of credits or effects, the garnishee is required to appear and make return under oath, showing the property in his hands belonging to the respondent at the time the attachment was served, and at the time of the return. If he fails to appear or to make such

<sup>3</sup> Adm. Rule 2.

<sup>4</sup> Adm. Rule 7.

<sup>5</sup> Adm. Rule 37. See *The Alpena*, 7 Fed. R. 361; *Two Hundred and Fifty Tons of Salt*, 5 Fed. R. 216; *Harriman v. Rockaway B. P. Co.*, 5 Fed. R. 461; *The Bremena v. Card*, 38 Fed. R. 144; *Christie v. Davis C. & C. Co.*, 92 Fed. R. 8.

<sup>6</sup> Act of March 2, 1867, U. S. R. S., § 990; Adm. Rule 47; *Louisiana Ins. Co. v. Nickerson*, 2 Low. 310. *The Carolina*, 14 Fed. R. 424; *Chiesa v.*

*Conover*, 36 Fed. R. 334. It has been held that a party who has been arrested can be discharged upon giving the bail required by the State laws. *Stone v. Murphy*, 86 Fed. R. 158. But it has been held that the power of a court of admiralty to arrest a defendant upon a claim for damages for a personal injury and cruel treatment of a sailor is not affected by the State law. *Bolden v. Jensen*, 69 Fed. R. 745. *Cf. supra*, §§ 341, 370.



an affidavit or to answer the interrogatories put to him as to the property of the respondent in his hands, he is subject to the compulsory process of the court, and may be punished for contempt, and compelled to furnish a stipulation.<sup>1</sup> Upon a default the court will hear the cause *ex parte* and “adjudge therein as to law and justice shall appertain,”<sup>2</sup> or for convenience will refer it to a referee to ascertain the amount due the libellant.

**§ 402. Release of property from custody of marshal — Claim.**—The owner of property attached, or his agent, may obtain its release from the custody of the marshal by filing with the clerk a claim to the property, and either depositing in the court a sum sufficient to secure the amount sued for, or giving a bond or stipulation therefor.<sup>1</sup> The claim must state under oath that the claimant is the true and *bona fide* owner of the property attached, and that no other person is the owner thereof. If put in by an agent, it must state that he is authorized to put it in; and if by the master of a ship, that he is the bailee thereof for the owner.<sup>2</sup>

**§ 403. Security for defendant's costs.**—A claimant must file with his claim a stipulation for costs similar to that required of a libellant.<sup>1</sup> So, in some of the districts, the respondent in a suit *in personam* is required to give a stipulation for costs, or his appearance or answer will not be received on file.<sup>2</sup> In the New York districts the stipulation is for \$250 in suits *in rem*, and for \$100 in suits *in personam*. It is not necessary to obtain the approval of stipulations for costs by the court or the adverse party before filing them; but the sureties must justify if the adverse party requires it.

**§ 404. Stipulation for value — Sureties.**—The form of security required in order to obtain the release of property from custody is either a bond to the marshal in double the amount claimed in the libel, or a stipulation for the value of the property. Such a stipulation is called a stipulation for value. Its amount is determined by an appraisement, unless fixed by the agreement of the parties. Where the value of the property

§ 401. <sup>1</sup> Adm. Rule 37.

<sup>2</sup> Adm. Rule 29.

§ 402. <sup>1</sup> Adm. Rule 11. See Bacon  
v. The Pawnoket, 61 Fed. R. 106.

<sup>2</sup> Adm. Rule 26; The Two Marys,  
12 Fed. R. 152.

§ 403. <sup>1</sup> Adm. Rule 26.

<sup>2</sup> Adm. Rule 25; Rawson v. Lyon,  
(S. D. N. Y.), 15 Fed. R. 881.



attached is much greater than the amount of the libelant's claim, the parties agree upon a less value, for the purposes of bonding only, sufficient to secure the claim. The condition of a stipulation for value is that the claimant will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered by the District Court, or by the appellate court if any appeal intervene.<sup>1</sup> The stipulators are not liable for interest on the sum stipulated, unless expressly provided for, except on default in complying with the terms of the stipulation.<sup>2</sup>

A stipulation for value, like stipulations for costs, must be executed by two sureties if the principal is a non-resident; if he is a resident of the district, one surety is enough. Sureties need not be freeholders, but they must be residents of the State in which the district is situated. A bond or stipulation for value cannot be filed unless it is approved either by the libelant's proctor, or by the court or some one authorized by the court to take bail.<sup>3</sup> In order to obtain the approval of the court, the claimant should serve upon the libelant's proctor a notice of justification, giving the name, occupation, and residence of each of the sureties proposed, and the time and place at which the libelant may attend and examine them. Such notice should be served a reasonable time before the examination. In the New York districts twenty-four hours' no-

§ 404. <sup>1</sup> Adm. Rules 10 and 11. But see *Pope v. Seckworth*, 46 Fed. R. 858. For a case where after the stipulation, the court allowed it to be withdrawn because of the invalidity of the warrant of seizure, see *Deas v. The Berkeley*, 58 Fed. R. 920. *Cf.* *The Zodiac*, 5 Fed. R. 220. In a case of a mistake as to the value of the vessel, the court has the power to reduce the amount of the stipulation after it is filed. *The Iris* (C. C. A.), 100 Fed. R. 104.

<sup>2</sup> *The Ann Caroline*, 2 Wall. 538; *The Webb*, 14 Wall. 406; *The Wanata*, 95 U. S. 600; *The Sydney*, 47 Fed. R. 260. But see *the Maggie J. Smith*, 123 U. S. 349; *The Maggie M.*, 33 Fed. R. 591.

<sup>3</sup> Adm. Rule 5. It seems that the court may, upon a summary application, relieve against an exorbitant demand of damages in a libel. *The Stelvio*, 30 Fed. R. 509. The court may in a proper case require additional security. *The City of Hartford*, 11 Fed. R. 89; *The Fred M. Lawrence*, 88 Fed. R. 910. But see *Barney Dumping B. Co. v. The Mutual*, 78 Fed. R. 144. The sureties are not bound to pay the claims of intervenors filed subsequently to the release of the vessel. *The Willamette* (C. C. A.), 70 Fed. R. 874. See *The Oregon*, 158 U. S. 186. The sureties after payment of the decree are subrogated to the rights of the libelant. *The Madgie*, 31 Fed. R. 926.

tice is required, except in suits for wages, when notice may be given *instantly*. When the sureties have been examined, the bond should be presented to the court for approval, on notice.

§ 405. **Bond to the marshal.**—Under the Act of Congress of March 3, 1847 (§ 941 of the Revised Statutes), property attached must be discharged from custody by the marshal on receiving from the claimant a bond in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in the cause. This statutory bond is under seal, and in that respect differs from the stipulations peculiar to admiralty. As by the terms of the statute the marshal is required to discharge the property on receiving such a bond, he cannot look to the claimant for his fees. But where a stipulation for value is given, the marshal's fees must be paid by the claimant. A bond under the act differs from a stipulation for value also in respect to the manner of enforcing it. A summary judgment may be entered against both the claimant and his sureties for the penal sum named in the bond; but where a stipulation for value has been given, judgment cannot be entered against the sureties in the first instance. In case a decree is not satisfied by the claimant, an order will be granted directing the stipulators to show cause within a fixed time<sup>1</sup> why execution should not issue, and if the stipulators fail to fulfill the engagements of their stipulation within such time, judgment is entered against them, and execution issues.

§ 406. **Appraisement.**—The usual method of obtaining an appraisement of property for the purpose of bonding is to apply to the court for an order appointing one or more appraisers. If the parties agree upon the appraisers, an order is not necessary. Before acting, appraisers should take and subscribe before the clerk or deputy clerk an oath or affirmation for the faithful performance of their duties, which should be filed. Notice of the time and place of making the appraisement should be given in writing by the appraisers to the proctors in the cause, and should also be affixed in a conspicuous place

§ 405. <sup>1</sup> In the New York districts, copy of the order on the proctor for within four days of the service of a the claimant.

near the court rooms, where the marshal usually affixes his notices. Upon completing the appraisement the appraisers should make and sign a report, which must be filed. Exceptions to the report may be filed by the parties, which will be heard by the court on notice.

**§ 407. Petition to bring in additional parties under Rule 59.** Where the claimant of a vessel proceeded against, or a respondent in a suit *in personam*, desires to have some other vessel or person proceeded against in the same suit for the damage claimed by the libelant, he may file a verified petition, containing suitable allegations, showing negligence in such other vessel or person contributing to such damage, and the particulars thereof, and praying that process be issued against such vessel or person, to the end that they may be proceeded against in the original suit. If such process is duly served, the suit proceeds as if the vessel or party thus brought in had originally been proceeded against. The petition must be filed before or at the time the petitioner answers the libel, and the petitioner must give a stipulation, with sufficient sureties, to pay to the libelant, and to any claimant or new party brought in, all costs, damages, and expenses that may be awarded against the petitioner.<sup>1</sup>

A party thus brought in must give the same bonds as he would have had to give if proceeded against by the libelant in the first instance, and must answer both the libel and petition.

Rule 59 was adopted by the Supreme Court in consequence of a decision of the District Court for the Southern District of New York in a collision case,<sup>2</sup> and by its terms is limited to causes of damage by collision; but the proceeding has been extended by the courts to other cases. Thus, in a suit for damage to cargo, the charterers of a vessel have been made respondents upon the petition of the owners;<sup>3</sup> and wharfingers have been brought in on the petition of the claimants of a steamship sued for negligence in discharging cargo on a wharf which was insufficient.<sup>4</sup>

**§ 408. Answer, when filed — Defenses: Contributory negligence, limitations, laches.**— The answer should be filed upon the return day, unless further time is allowed by the court or

§ 407. <sup>1</sup> Adm. Rule 59.

<sup>2</sup> The Hudson, 15 Fed. R. 162.

<sup>3</sup> The Alert, 44 Fed. R. 685.

<sup>4</sup> The City of Lincoln, 25 Fed. R. 835.

the libelant's proctor. It must be full, explicit, and distinct to each separate allegation of the libel in the same order as numbered in the libel. It must be verified, except where the amount involved is less than \$50.<sup>1</sup>

The answer may set up defenses by way of counter-claim, but no affirmative judgment can be obtained by the claimant or respondent without filing a cross-libel.<sup>2</sup>

Contributory negligence is not a bar to a recovery in admiralty.<sup>3</sup> In collision cases, where both vessels are found guilty of fault contributing to the collision, and only one of them is injured, the libelant recovers one-half of his damages; where both vessels are injured, the damages suffered by the two vessels are added together and equally divided, and the vessel which suffers most recovers one-half the difference between the amounts of their respective losses.<sup>4</sup> In cases of tort other than collision the same rule has frequently been applied; but, although the Supreme Court has held that in such cases contributory negligence does not bar a recovery, it has not determined whether the decree should be for exactly one half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages.<sup>5</sup>

There is no statutory limit of time in which suits in admiralty must be brought. Laches is, however, a valid defense, the delay which will defeat a suit depending in every case upon the peculiar equitable circumstances of the case.<sup>6</sup>

§ 408. <sup>1</sup> Adm. Rules 27 and 48. In the Southern District of New York all answers must be verified. See *Burrill v. Crossman* (C. C. A.), 69 Fed. R. 747; *Virginia Home Ins. Co. v. Sundberg*, 54 Fed. R. 889. After general appearance and an answer upon the merits it is too late to move for a dismissal because of a misnomer in the libel and monition. *Mina v. L & V. Florio S. S. Co.*, 23 Fed. R. 915. A plea to the jurisdiction may be combined with an answer to the merits. *Inman v. The Lindrup*, 70 Fed. R. 718. New matter set up as a defense should be articulated and pleaded separately and not blended with the response to any article of the libel. *The Whistler*, 13 Fed. R. 205.

<sup>2</sup> *The Reuben Doud*, 8 Fed. R. 520. It was held, under a plea that the libelant, a pilot, after signaling an offer of services, had pulled down his signal and sailed away, that the respondent could not prove that other pilots had offered their services at the same time, and that it would have put the vessel to serious inconvenience if it had taken the libelant. *Marshall v. The Earnwell*, 68 Fed. R. 228. See also *White v. The Renaiier*, 45 Fed. R. 773.

<sup>3</sup> *The Max Morris*, 137 U. S. 1.

<sup>4</sup> *The North Star*, 106 U. S. 17.

<sup>5</sup> *The Max Morris*, 137 U. S. 1.

<sup>6</sup> *The Key City*, 14 Wall. 653; *Southard v. Brady*, 36 Fed. R. 560. Courts of Admiralty are not bound by the

“When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libelant, and no replication, general or special, shall be filed unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libelant may amend his libel so as to confess and avoid, or explain, or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendants shall answer such amendments.”<sup>7</sup>

§ 409. **Tender.**—A tender made before suit is of no avail as a defense unless, on suit brought, it is deposited in court. When a tender is first made after suit brought, it must include interest up to the next term of the court and the taxable costs then accrued.

§ 410. **Exceptions — Amendments.**—Pleadings may be excepted to for surplusage, irrelevancy, impertinence, or scandal. Either party may also except to the sufficiency, fullness, or definiteness of the pleading.<sup>1</sup> Exceptions should specify clearly the

State Statutes of Limitation. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* (C. C. A.), 94 Fed. R. 180. In the absence of special circumstances they will usually follow the analogy of the rule prevailing in courts of common law; and they will not dismiss a libel *in personam* for a delay of less than six years. *Bailey v. Sundberg* (C. C. A.), 49 Fed. R. 583. Where, however, a vessel had been in the possession of innocent purchasers for two years, it was held too late to file a libel *in rem* because of a collision four years before. See also *The Robert Gaskin*, 9 Fed. R. 62; *Nesbit v. The Amboy*, 36 Fed. R. 925. But see *The Alaska*, 33 Fed. R. 107; *Metcalf v. The Alaska*, 130 U. S. 201; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* (C. C. A.), 94 Fed. R. 180; *Jones v. The Carrie*, 46 Fed. R. 796. Libels *in personam* were held to have been barred after nine years. *Coburn v. Factors' & Tr. Ins. Co.*, 20 Fed. R. 644. And after eight and

a half years. *Scully v. Raymond*, 18 Fed. R. 547. A delay of less than a year was held to bar a libel *in rem* for supplies, when, in the mean time, the vessel had been bought by strangers in good faith and without notice, and the vendor had become insolvent. *Magee v. The Lyndhurst*, 48 Fed. R. 839. Laches may be a ground for postponing the lien of a materialman to that of subsequent creditors of the boat. *The Thomas Sherlock*, 22 Fed. R. 253. But see *Starin v. The John Dillon*, 46 Fed. R. 527. It has been said that the defense of laches cannot be raised unless pleaded in the answer. *The Shadyside*, 23 Fed. R. 721.

<sup>7</sup> Adm. Rule 51, as amended January 27, 1896; 160 U. S. 693.

§ 410. <sup>1</sup> Adm. Rules 28, 30. An affidavit cannot be considered upon the hearing of an exception to a libel. *Prince Steam Shipping Co. v. Lehman*, 39 Fed. R. 704. The courts will, however, then consider facts not

parts excepted to. The party against whom the exceptions are taken should notify the other side that he submits to them, or else notice them for hearing before the court. If the defendant's exceptions are overruled, he must file his answer within such time as the court allows. Where exceptions are peremptory, as, for example, to the jurisdiction, if they are sustained, judgment may be entered in favor of the successful party; if not peremptory, the pleading excepted to must be amended. Exceptions to a libel should be filed on return of process. The time within which exceptions to an answer must be filed is determined by the rules of practice of the several districts.<sup>2</sup>

Great freedom of amendment is allowed in admiralty. In matters of form, pleadings may be amended at any time, on motion, as of course; in matters of substance they may be amended at any time before the final decree upon such terms as the court shall impose.<sup>3</sup>

§ 411. Cross-libel.—A defendant cannot recover an affirmative judgment without filing a cross-libel;<sup>1</sup> and the practice of stipulating that the answer in the original suit operate as a cross-libel has been expressly disapproved by the Supreme Court.<sup>2</sup>

Whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action as that for which the orig-

pleaded of which they may take judicial notice. *The Seminole*, 42 Fed. R. 924; *supra*, §§ 106, 264. See also *U. S. v. The Haytian Republic*, 57 Fed. R. 508.

<sup>2</sup>In the New York districts the libelant has four days from the filing of the claim or answer in which to except thereto. It has been held that where exceptions to an answer were drawn with several specifications, the failure to sustain any specification was fatal to the exception, *The Intrepid*, 42 Fed. R. 185; and that exceptions to an answer for insufficiency and impertinence cannot be taken to the same matter either conjunctively or disjunctively. *The Whistler*, 13 Fed. R. 295. As to exceptions to answers, see *Todd v. Tul-*

*chen*, 2 Fed. R. 600; *The Dictator*, 80 Fed. R. 699; *The City of Salem*, 10 Fed. R. 843; *Morgan L. & T. S. S. Co. v. De Arroategui*, 25 Fed. R. 624.

<sup>3</sup>For cases when amendments to libels were disallowed, see *The Iona* (C. C. A.), 80 Fed. R. 933; *The Keystone*, 81 Fed. R. 412; *New Haven S. D. Co. v. The Mayor*, 86 Fed. R. 716. For a case where an amendment to an answer was disallowed, see *The Horace V. Parker* (C. C. A.), 74 Fed. R. 640.

§ 411. <sup>1</sup>*The Reuben Doud*, 8 Fed. R. 520; *The Nadia*, 18 Fed. R. 729. As to the matters which may be set up by a cross-libel, see *The Highland Light*, 88 Fed. R. 296.

<sup>2</sup>*Ward v. Chamberlain*, 21 How. 572.



inal libel was filed, the respondents or claimants, as the case may be, must give security in the usual amount and form to respond in damages as claimed in the cross-libel, unless the court on cause shown shall otherwise direct.<sup>3</sup> Upon application to the court, all proceedings upon the original libel will be stayed until such security is given.<sup>4</sup>

§ 412. **Interrogatories.**—Interrogatories may be annexed either to the libel<sup>1</sup> or to the answer.<sup>2</sup> They must be answered under oath by the adverse party, unless to answer them would expose him to prosecution or penalty for crime, or to forfeiture of his property for a penal offense.<sup>3</sup> The party interrogated may object to the interrogatories on the ground of irrelevancy or impertinence, or on any ground for which exceptions to a pleading are permitted.<sup>4</sup> The defendant must answer the interrogatories at the same time that he files his answer. The time within which the libelant must answer interrogatories annexed to an answer is determined by the rules or practice of the several districts.<sup>5</sup> In default of due answer to interrogatories the court may adjudge the party in default, or compel his answer by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the other party.<sup>6</sup> Answers to interrogatories are parts of the pleadings and do not stand as evidence for the party answering.<sup>7</sup>

§ 413. **Trial.**—In many of the districts, as in New Jersey and Pennsylvania, the evidence is taken before the clerk, as in equity, and the court merely hears the case summed up. The proofs are taken subject to objections, which are renewed upon

<sup>3</sup> Adm. Rule 53; *Genther v. Wiley*, 85 Fed. R. 797; *Empresa Maritima v. N. & S. Am. St. Nav. Co.*, 16 Fed. R. 502; *Old Dominion S. S. Co. v. Kufald*, 100 Fed. R. 331; *Lochmore S. S. Co. v. Hagar*, 78 Fed. R. 642.

<sup>4</sup> *Vianello v. The Credit Lyonnais*, 15 Fed. R. 637; *Empresa Maritima v. Vapor v. N. & S. Am. St. Nav. Co.*, 16 Fed. R. 502. It has been held that upon a cross-libel the court has power to order a monition *in personam* thereupon, to be served upon the proctors of the original libelants who are non-residents. *The Eliza Lines*, 61 Fed. R. 308.

§ 412. <sup>1</sup> Adm. Rule 23; *Scobel v. Giles*, 19 Fed. R. 224; *The Edwin Baxter*, 32 Fed. R. 296.

<sup>2</sup> Adm. Rule 32; *Stoffregan v. The Mexican Prince*, 70 Fed. R. 246.

<sup>3</sup> Adm. Rules 31, 32; *Pollock v. The Sea Bird*, 3 Fed. R. 573; *Pollock v. Bridgeport St. Co.*, 114 U. S. 411; *supra*, §§ 109, 134, 281.

<sup>4</sup> Adm. Rule 28.

<sup>5</sup> In the New York districts, within four days from the filing of the answer and interrogatories.

<sup>6</sup> Adm. Rule 32.

<sup>7</sup> *Cushing v. Laird* (Blatchford, J.), 6 Ben. 408; *The Serapis*, 37 Fed. R. 436.

the trial and then passed on by the court. In other districts, as in Massachusetts, New York, and Connecticut, the witnesses are examined in open court. The judge is the trier of the facts as well as the law. In some of the districts experts are at times called by the court to sit with it in order to pass upon questions of navigation, like the Trinity masters in the English practice.<sup>1</sup> On the trial, a motion should not be made to dismiss the libel on the libelant's proofs alone, except where the defendant does not intend to introduce any evidence in his own behalf. He cannot move to dismiss the libel on the libelant's proofs, and then, if the motion is denied, proceed with his own proofs.

The Revised Statutes provide for a jury trial in causes relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upwards enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes.<sup>2</sup> The verdict of the jury, in such a case, is reviewable by appeal, and not by writ of error.<sup>3</sup>

§ 413. <sup>1</sup>The Empire (E. D. Mich.), 19 Fed. R. 558. After a decree *pro confesso* in admiralty the damages must still be proved. Cape Fear T. & Tr. Co. v. Pearsall (C. C. A.), 90 Fed. R. 435; *supra*, §§ 103, 104. Where a case was submitted upon the pleadings, it was held that averments of new matter in the answer, and allegations in the libel which the answer denied, must both be disregarded, except in so far as they were admissions against interest. North Am. Dr. & Imp. Co. v. The River Mersey, 48 Fed. R. 686.

<sup>2</sup>The Erie Belle, 20 Fed. R. 63. A trial by jury is not necessary upon a libel for a penalty for the failure to report a vessel from a foreign port to the consul and to enter the required manifest. The Paolina, 11 Fed. R. 171. Nor to a vessel engaged in commerce exclusively between ports of the same State. Sanderson v. The City of

Toledo, 73 Fed. R. 220. Nor to a vessel engaged in commerce upon the rivers Ohio and Monongahela. Bigley v. The Venture, 21 Fed. R. 880. It seems that the verdict of the jury is merely advisory. The Empire, 19 Fed. R. 558; Sanderson v. The City of Toledo, 73 Fed. R. 220; *supra*, §§ 300-304.

<sup>3</sup>U. S. R. S., § 566; Boyd v. Clark, 13 Fed. R. 908. Ordinarily new trials and amendments cannot be ordered unless a motion is made at the term at which the decree is entered. The Comfort, 32 Fed. R. 327; The Annex, 38 Fed. R. 660. But see The Madgie, 31 Fed. R. 926. In an extraordinary case a new trial was ordered by the District Court upon a libel of review filed by a surety after the term. Jackson v. Munks, 58 Fed. R. 596; s. c. (C. C. A.), 69 Fed. R. 571. But see The Annex, 38 Fed. R. 620; Mainwaring v. The Carrie Delap, 1 Fed.

§ 414. **Evidence — Depositions.**— The rules of evidence are the same in admiralty as in other causes in the Federal courts. As, however, an appeal in admiralty is a new trial, it is not necessary to take exceptions to the rulings of the trial judge. All the rights of the appellant are preserved by the noting of objections in the District Court. In admiralty causes much of the evidence is taken *de bene esse*, as the witnesses are, for the most part, seafaring men. The practice is governed by §§ 863–865 of the Revised Statutes.<sup>1</sup> The powers vested in commissioners of the Circuit Court are now extended to notaries public.<sup>2</sup>

§ 415. **Interlocutory decree and reference.**— The question of damages is seldom tried before the court. In case the libellant is successful, an interlocutory decree is entered, by which it is referred to a commissioner or referee to ascertain the damages sustained by the libellant, and report thereon to the court. Such a referee has all the powers of the court. Unlike a master taking proofs before trial, he rules upon questions of evidence. Upon the filing of the report by the commissioner, the successful party should serve his opponent with notice of the filing, and of a motion to confirm the report, and thus limit the time within which exceptions may be filed; or the report may be confirmed *nisi* on motion, without notice, on the return day, which will also fix the time within which exceptions may be filed. The party filing exceptions should notice them for hearing. They must be specific.<sup>1</sup> Upon the expiration of the time allowed by the practice of the District Court for the filing of exceptions, if none have been filed, a final decree may be entered. The final decree should contain a provision confirming the report. It is not necessary to enter a special order of confirmation.<sup>2</sup>

R. 880. A new trial in the District Court has been ordered on an appeal. *The Glide* (C. C. A.), 72 Fed. R. 200.

§ 414. <sup>1</sup>*Supra*, §§ 286–290.

<sup>2</sup> Act of Aug. 15, 1876, ch. 304; U. S. R. S., § 1778.

§ 415. <sup>1</sup>*The Commander-in-Chief*, 1 Wall. 43; *The Cayuga* (C. C. A.), 59 Fed. R. 488. But see *Ross v. So. Cotton Oil Co.*, 41 Fed. R. 152. It has been held that the claimant might

move to dismiss at the close of the libellant's case, and take testimony pending that motion without waiving his right to have his motion decided, regardless of the other facts brought out upon the cross-examination of his witnesses. *Puget Sound M. Depot v. The Guy C. Cross*, 53 Fed. R. 826.

<sup>2</sup> In the New York districts four days are allowed from the date of

§ 416. Final decree.—The form of the final decree varies according to the form of the action and the nature of the security furnished. In suits *in rem*, if the *res* has been bonded under the Act of 1847, a summary judgment for the amount of the bond may be entered against the claimant and his sureties.<sup>1</sup> Where a stipulation for value has been given, the final decree provides that, unless the decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of the court, the stipulators for costs and value cause the engagements of their stipulations to be performed, or show cause within a time fixed by the rules,<sup>2</sup> or on the first day of jurisdiction thereafter, why execution should not issue against their property to enforce satisfaction of the decree. At the expiration of the time provided by the rules of the several districts, and on proof of service of a copy of the decree on the proctors for the unsuccessful party, the court will grant an order to show cause why execution should not issue against the stipulators. In suits *in rem*, the final decree always provides for the condemnation and sale of the *res*; but this provision is, of course, not carried out by an actual sale if the *res* has been bonded. The bond or stipulation takes the place of the *res*, which once released cannot be reached again by process, unless it be subject to execution as the property of one of the stipulators or bondsmen.<sup>3</sup> In suits *in personam*, the decree follows the form of an ordinary decree in equity, containing, however, a provision for judgment against the stipulators for costs similar to that contained in a decree against stipulators for value. A decree *in personam* cannot be entered in a suit *in rem*.<sup>4</sup>

Where two vessels are proceeded against and both are adjudged in fault, the decree should be against the two vessels and their respective stipulators severally, each for one moiety of the entire damage, interest, and costs, so far as the stipulated value of each vessel extends, and should provide that any balance of such moiety over and above such stipulated value of

notice of filing the report or from the return-day on which it is confirmed *nisi*, in which to file exceptions.

§ 416. <sup>1</sup> Johnson v. Chicago & Pac. Elev. Co., 119 U. S. 388.

<sup>2</sup> In the New York districts, four days.

<sup>3</sup> The Union, 4 Blatchf. 90; The Thales, 8 Ben. 827; Johnson v. The Hattie Belle, 65 Fed. R. 119.

<sup>4</sup> The Zodiac, 5 Fed. R. 220.

either vessel, or which the libelant shall be unable to collect or enforce, be paid by the other vessel or its stipulators to the extent of the stipulated value thereof beyond the moiety due from said vessels.<sup>5</sup> Where both the libelant's and the claimant's vessels are in fault, the damage done to both vessels is added together in one mass or sum and equally divided, and a decree is pronounced in favor of the vessel which has suffered the most against the other vessel for half the difference between the amounts of their respective losses.<sup>6</sup>

§ 417. **Sales.**—In suits *in rem*, where a default has been taken, or where, although a defense has been interposed, the *res* has not been bonded, the final decree orders the clerk to issue a writ of *venditioni exponas* to the marshal, directing him to sell the property in his custody at public auction. Such a sale gives the purchaser an absolute title, good as against all the world, if the proceedings have been duly taken.<sup>1</sup> Sales under a *fieri facias*, on the other hand, convey only the defendant's interest in the property sold. In no case will a sale be permitted in a proceeding *in rem* by default or by consent of parties unless publication has been duly made. The proceeds of sale must be paid over by the marshal forthwith to the clerk, who holds them in the Registry.<sup>2</sup> All moneys deposited in the District Court are thus held in the Registry, being deposited by the clerk in some bank designated by the court subject to its orders.<sup>3</sup>

§ 418. **Sales as perishable.**—It often becomes necessary, from the perishable nature or condition of the property attached, or its liability to deterioration, decay, or injury by being detained in custody, to sell it before the termination of the suit. In such cases, upon application, the court will order a sale, and direct the proceeds to be brought into court to abide the event of the suit.<sup>1</sup> A sale will not be allowed merely on

<sup>5</sup> *The Alabama and Gamecock*, 92 U. S. 695.

<sup>6</sup> *The North Star*, 106 U. S. 17, 28. The court may in a proper case consolidate two libels, try them together and enter a single decree. *The North Star and The Ellen Warley*, 106 U. S. 17; *The Eliza Lines*, 61 Fed. R. 308; *The Sarah E. Kennedy*, 25 Fed. R.

672; *supra*, § 37. Or it may sever the claims in the same libel and render a decree in one before it disposes of the other. *Larrinaga v. Two Thousand Bags of Sugar*, 40 Fed. R. 507.

§ 417. <sup>1</sup>*The Trenton*, 4 Fed. R. 657.

<sup>2</sup> Adm. Rule 41.

<sup>3</sup> U. S. R. S., § 995; Adm. Rule 42. § 418. <sup>1</sup> Adm. Rule 10.

the ground that the expenses of custody pending the suit may be a burden to the owners of property.

§ 419. **Costs.**—In admiralty causes costs are subject to the same rules as in equity causes in the Federal courts. They are, of course, in the discretion of the court. Where damages are apportioned, costs are likewise apportioned, each party taxing a full bill of costs, and the party whose bill of costs is the largest recovering half the difference between the two bills as taxed.<sup>1</sup> This is true where the libelant's vessel alone has suffered damage, as well as where both vessels have been damaged.<sup>2</sup> But in such a case the libelant will be allowed the full costs and disbursements of a reference made necessary by the act of the defendant.<sup>3</sup> If, however, the defendant offers to allow the damages to be assessed at a certain sum, and the referee's report is for no greater sum, the libelant will be denied costs of the reference.

Where a libelant recovers a portion of his damages against one vessel and a portion against another, he recovers costs against the vessels in similar proportions.<sup>4</sup> Where a libel is dismissed for want of jurisdiction, no costs are allowed.<sup>5</sup> Nor can costs be recovered against the United States.<sup>6</sup> When a libelant upon his own appeal recovers less than three hundred dollars, exclusive of costs, he cannot recover costs, but, in the discretion of the court, may be adjudged to pay costs himself.<sup>7</sup> When both parties appeal, and the decree of the District Court is not disturbed, it is not usual to allow costs to either party.<sup>8</sup>

§ 420. **Intervenors.**—In suits *in rem* third persons often desire to intervene for their own interest or protection, as, for example, where there are many claims against a vessel, and one libelant contests the claim of another, either on the merits or on the question of amount due. Such a contestant is per-

§ 419. <sup>1</sup>The *America*, 92 U. S. 432.

<sup>2</sup>The *Warren* (Blatchford, J.), 25 Fed. R. 782. *Contra*, The *Hercules*, 20 Fed. R. 205. See also The *Pennsylvania*, 15 Fed. R. 814, where a different method of apportioning costs was adopted.

<sup>3</sup>The *Doris Eckhoff*, 41 Fed. R. 156, 159.

<sup>4</sup>The *Alabama and Gamecock*, 92 U. S. 695.

<sup>5</sup>The *McDonald*, 4 Blatchf. 477; *Wenberg v. A Cargo of Mineral Phosphate*, 15 Fed. R. 285, 288.

<sup>6</sup>The *Antelope*, 12 Wheat. 546.

<sup>7</sup>The *Cassius*, 41 Fed. R. 367; U. S. R. S., § 968, which, however, refers in terms only to the Circuit Court.

<sup>8</sup>The *William Cox*, 9 Fed. R. 672; *McKeen v. Morse*, 1 U. S. App. 7.



mitted to intervene in a suit and file an answer or petition upon giving security for costs.<sup>1</sup>

§ 421. **Petition against proceeds of sale.**— The proceeds of a sale when paid into the registry take the place of the *res*, and may be proceeded against in the same way as the *res* itself. It is not necessary to issue process; any person having an interest in the fund may file a petition against the proceeds, in which he should set forth his cause of action, and allege the sale and payment into court of the proceeds.<sup>1</sup> This petition is subject to all the rules applicable to libels. After the claims against a *res* and its proceeds have been paid or otherwise disposed of by the court, the person entitled to the remnants and surplus thereof may file a petition setting forth his interest and obtain thereon an order of reference to determine his right to the fund. The court has power to distribute the surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated.<sup>2</sup>

§ 422. **Priorities.**— When the proceeds of a sale or the amount of a stipulation for value are insufficient to satisfy all the claims against a vessel or other *res*, it becomes necessary for the court to determine the order in which the claims shall be paid. The court will order payment in accordance with the priorities as settled by the admiralty law, without reference to the time when the libel was filed or the decree entered. But the libellant who files the first libel or in whose suit a sale is had has a priority so far as costs are concerned.<sup>1</sup>

§ 423. **Appeals — What appealable; to what court.**— Before the Evarts Act of March 31, 1891, an appeal may be taken from the final decree of a District Court in all cases in which the matter in dispute exceeds the sum or value of \$50, exclusive of costs.<sup>1</sup> The appeal must now be taken, except in prize cases, to the Circuit Court of Appeals, the decision of which court is final in all admiralty cases, except that it may certify to the Supreme Court any questions of law concerning which it de-

§ 420. <sup>1</sup> Adm. Rule 84.

§ 421. <sup>1</sup> Adm. Rule 43; Schuchardt v. Babridge, 19 How. 239; Petrie v. The Coal Bluff, 8 Fed. R. 531.

<sup>2</sup> The Lottawanna, 21 Wall. 558,

582; The E. V. Mundy, 22 Fed. R. 173; The Guiding Star, 18 Fed. R. 263.

§ 422. <sup>1</sup> The Fanny, 2 Low. 508.

§ 423. <sup>1</sup> U. S. R. S., § 631.

sires instruction, or the Supreme Court may itself require by *certiorari* or otherwise such a case to be certified to it for review and determination.<sup>2</sup> From the final sentences and decrees in prize cases, irrespective of the amount involved, appeals are taken immediately to the Supreme Court of the United States.<sup>3</sup>

§ 424. Appeals, when and how taken.— Appeals must be taken within six months after the entry of the final decree.<sup>1</sup> But the rules of the District Courts fix the time in which, if the appellant desires to stay execution, an appeal must be taken.<sup>2</sup> An appeal is usually taken by the service of a brief notice in writing on the clerk of the District Court and the proctor for the adverse party of the intention of the appellant to appeal.

§ 425. Practice on appeals.— The practice on appeals in admiralty is now analogous to the former practice on appeal from the Circuit Courts to the Supreme Court, rather than from the District to the Circuit Courts. The rules of the Circuit Courts of Appeals as to *supersedeas* and cost bonds, citations, returns, docketing cases, dismissal of appeals, printing records and briefs, motions, arguments, rehearings, costs, and mandates apply as well to admiralty as to equity.<sup>1</sup>

§ 426. Petition of appeal.— In some respects an appeal in admiralty is a new trial. The cause is tried before the appellate court *de novo*.<sup>1</sup> The pleadings may be amended, and new proofs introduced, or a new decision may be sought on the

<sup>2</sup> 26 St. at L. 828, § 6. The writ is frequently issued in cases of admiralty.

<sup>3</sup> 26 St. at L. 828, § 5; *The Paquete Habana*, 175 U. S. 677.

§ 424. <sup>1</sup> Act of March 3, 1891, ch. 517, § 11 (26 St. at L. 829).

<sup>2</sup> In the New York and New Jersey districts the appellant has ten days from the entry of the final decree in which to appeal; in Connecticut, twelve.

§ 425. <sup>1</sup> The admiralty rules of the Court of Appeals for the Second Circuit, which are published in the Appendix, *infra*, provide that an appeal

may be taken by filing in the clerk's office and serving on the proctor of the adverse part a simple notice of appeal, without any assignment of errors or allowance by any judge; security in the sum of two hundred and fifty dollars for costs to be given within ten days after filing the notice (I, II). They allow the appellant to appeal from a part only of the decree (III). They also regulate the contents and form of the apostles or transcript, and the briefs (IV, XV).

§ 426. <sup>1</sup> *Irvine v. The Hesper*, 122 U. S. 258.

pleadings and proofs which were before the District Court.<sup>2</sup> According to the old practice, within ten days from the taking of the appeal the appellant must file with the clerk of the District Court, and serve upon the proctor for the appellee, a petition of appeal,<sup>3</sup> which is a summary statement of the proceedings in the cause, showing when and for what the libel was filed, when the answer was filed, and what relief was prayed for in it, when and before whom the cause was tried, what the decree of the District Court was, when it was entered, and when the appeal therefrom was taken. It must state whether the appellant intends to make new allegations or proofs in the Circuit Court of Appeals, to pray different relief, or to seek a new decision on the facts. The appellant cannot amend his pleadings or take new proofs in the appellate court unless he has stated his intention to do so in his petition of appeal.<sup>4</sup>

§ 427. **Bond on appeal.**— Unless the appellant give security for damages and costs, the decree of the District Court may be enforced at the expiration of the time limited by the rules, as if there had been no appeal. The bond runs to the appellee, and should be executed by the appellant and two sureties; but it is not necessary that all the appellants should sign the bond.<sup>1</sup> The obligation of the bond is that the appellant will prosecute his appeal to effect, and answer all damages and costs that may be decreed against him by the appellate court, if he fail to make his appeal good. If a stay of execution is not sought, the bond may be given for costs only. So, if the security given in the District Court is by its terms enforceable in the

<sup>2</sup> *The Lucille*, 19 Wall. 73.

<sup>3</sup> The rules of the Second Circuit adopted July 1, 1892, do away with the necessity for a petition of appeal and provide that the apostles shall contain a summary statement of the proceedings in the cause.

<sup>4</sup> *Phenix Ins. Co. v. Liverpool & G. W. S. S. Co.*, 22 Blatchf. 372; s. c. *sub nom. The Montana*, 22 Fed. R. 715, 730. No severance is needed to allow the claimant to appeal alone without his sureties. *The Glide* (C. C. A.), 72 Fed. R. 200. But

part of the claimants for damages who have intervened in a proceeding cannot ordinarily maintain a separate appeal from a decree limiting liability without procuring a severance from the others. *Short v. The Columbia* (C. C. A.), 67 Fed. R. 942. See *infra*, chapter on Writs of Error and Appeals.

§ 427. <sup>1</sup> *Brockett v. Brockett*, 2 How. 238. In the Second Circuit the amount of the bond is \$250. (C. C. A. Rule II, 2d Ct.).

appellate court, an additional bond for the whole claim will not be exacted. Security will be required only in an amount sufficient to pay the costs of the suit and damages for delay, and costs and interest on the appeal.<sup>2</sup>

**§ 428. Assignment of errors.**—The general rules of the Circuit Courts of Appeal provide that the appellant shall file an assignment of the errors which he intends to urge on appeal, and that errors not so assigned will be disregarded. Rule 11 is broad enough in its terms to include admiralty causes. It is therefore necessary for the appellant in admiralty to file a formal assignment of errors.<sup>1</sup>

**§ 429. Bill of exceptions — Record on appeal.**—A bill of exceptions is not required on an appeal in admiralty from the District Court. The record is made as provided in Rule 52 of the Rules of the Supreme Court in Admiralty. It should contain the style of the court, the names of the parties, both original and substituted, the process, all bail and stipulations, and if a sale has been made, the orders, warrants, and reports relating thereto, the pleadings, testimony, and exhibits, any order or report to which exception is taken, the final decree, the notice and petition of appeal, citation, *supersedeas*, assignment of errors, and the opinion of the district judge.<sup>1</sup> The clerk will,

<sup>2</sup> C. C. A. Rule 13; *The Brantford City*, 82 Fed. R. 324.

§ 428. <sup>1</sup> In the Second Circuit the rules adopted May 20, 1892, do away with the necessity of an assignment of errors. Their validity in this respect has not been decided by the Supreme Court.

§ 429. <sup>1</sup> Admiralty Rules IV and V of the Second Circuit are as follows:

“IV. Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

“(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has

taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

“(2) All the pleadings, with the exhibits annexed thereto.

“(3) All the testimony and other proofs adduced in the cause.

“(4) The interlocutory decree, and any other order of the court which

however, omit any of the pleadings, testimony, or exhibits which the parties agree by written stipulation may be omitted.

**§ 430. New proofs on appeal.**— Although an appeal in admiralty opens the decree of the lower court, and gives the parties another trial, the proofs adduced in the District Court are invariably used in the appellate court. If new proofs are taken, the witnesses are examined upon notice before a commissioner or notary public,<sup>1</sup> and their depositions are offered in evidence upon the hearing of the appeal. A party is not

appellant may desire to have reviewed on the appeal.

“(5) Any report of the commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

“(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

“(7) The final decree, and the notice of appeal. And

“(8) The assignments of error.

“Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

“Sec. 3. Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.”

“V. The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all the papers contained therein on file in his office.”

It is the safer practice to prepare

the record so that it will show which witnesses were examined in the presence of the district judge, and which were not. *The Gypsum Prince* (C. C. A.), 67 Fed. R. 612.

§ 430. <sup>1</sup> Adm. Rule 49. This rule is by its terms confined to new proofs “taken in a Circuit Court,” and is therefore strictly not applicable to proofs taken in a Circuit Court of Appeals. The rules of the Second Circuit Court of Appeals provide that “upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days’ notice to the adverse party” (VII). “If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath. If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing” (VIII).

permitted deliberately to withhold evidence in the District Court, and after having failed there to offer it in the appellate court.<sup>2</sup> Objections to the taking or admission of new proofs must be made promptly, and if the appellee has cause to show why new proofs should not be offered, he should give notice thereof to the Court of Appeals at the opening of the term, on affidavits stating the cause intended to be shown.<sup>3</sup> The act of February 16, 1875 (18 St. at L., p. 315, ch. 77, § 3), which required the Circuit Court to make findings of fact and conclusions of law, was designed to relieve the Supreme Court from the necessity of deciding questions of fact in admiralty causes. It does not apply to appeals to the Circuit Court of Appeals.<sup>4</sup>

**§ 431. Practice upon appeals to the Supreme Court.**—The practice upon appeals to the Supreme Court in Admiralty is the same as that upon other appeals to that tribunal, except that in prize cases testimony might perhaps be taken upon the appeal.<sup>1</sup>

**§ 432. Prohibition.**—The Supreme Court has power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty.<sup>1</sup> The writ will be issued only where it clearly appears that the District Court is about to assume jurisdiction of a matter beyond its legal cognizance.<sup>2</sup> It cannot be used as a substitute for other remedies, such as *certiorari* or appeal.<sup>3</sup> Whether the writ should issue or not depends not upon facts stated *dehors* the record, but upon those stated in the record upon which the District Court is called to act. Mere matters of defense, whether going to oust the jurisdiction of the court or to establish the want of merits in the libelant's

<sup>2</sup> The *Saunders*, 23 Fed. R. 803; The *Stonington*, 25 Fed. R. 621. Cf. *In re Hawkins*, 147 U. S. 486; *supra*, § 363.

<sup>3</sup> The *Stonington*, 25 Fed. R. 621.

<sup>4</sup> The *Havilah* (C. C. A.), 48 Fed. R. 684. It has been held that on appeal from a District to a Circuit Court defective process cannot be cured by amendment. *The City of Lincoln*, 19 Fed. R. 460.

§ 431. <sup>1</sup> For the practice see the final chapter of this book.

§ 432. <sup>1</sup> U. S. R. S., § 688; *supra*,

§ 862. Adm. Rule 12 of the Circuit Court of Appeals for the Second Circuit provides that "a writ of inhibition may be awarded by this court on motion of the appellant to stay proceedings in the court below, when circumstances require."

<sup>2</sup> *Smith v. Whitney*, 116 U. S. 167, 176.

<sup>3</sup> *Ex parte Gordon*, 104 U. S. 515; *Ex parte Pennsylvania*, 109 U. S. 174; *Smith v. Whitney*, 116 U. S. 167.



case, cannot be admitted under the petition to displace the right of the District Court to entertain the suit.<sup>4</sup>

The proper practice is to apply to one of the justices of the Supreme Court for leave to file a suggestion for the writ, which is a verified petition setting forth the facts on which the petitioner relies.<sup>5</sup> Upon filing the petition, the petitioner should apply to the court *ex parte* for a rule to show cause why the writ should not issue. This is served upon the district judge, who makes a return setting forth the proceedings in the cause, and annexing a certified copy of the records and papers on file therein. The proctor for the libellant in the cause must be notified of the time when the rule is returnable.

§ 433. *Mandamus*.—The Circuit Courts of Appeal have the powers possessed by the Supreme Court and the Circuit and District Courts, by virtue of § 716 of the Revised Statutes, to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.<sup>1</sup> Thus, if a District Court, in a case of admiralty and maritime jurisdiction, refuses to entertain the cause or to pronounce a decree, or to allow an appeal from a decree when interposed according to the rules prescribed by the court or justified by the general principles of the admiralty practice recognized in the courts of the United States, the Circuit Court of Appeals may issue a writ of mandamus to compel the District Court to proceed in the cause, to enter a decree, or to allow an appeal upon the proper requisitions of the law being complied with by the party.<sup>2</sup> A mandamus will issue to compel the return of the apostles, or record on appeal, when unreasonably delayed by the District Court or clerk.<sup>3</sup>

The practice on application for the writ is to obtain *ex parte* an order to show cause why the writ should not issue, or to apply to the court on due notice upon a sworn petition or complaint setting forth the facts which entitle the relator to the writ.<sup>4</sup>

<sup>4</sup> *Ex parte Easton*, 95 U. S. 68.

<sup>2</sup> *The New England* (Story, J.), 3

<sup>5</sup> In *U. S. v. Peters*, 3 Dall. 121, a suggestion and writ are set out in full.

Sumn. 495.

<sup>3</sup> *U. S. v. Gomez*, 3 Wall. 752.

<sup>4</sup> *Ex parte Bradstreet*, 7 Pet. 634,

§ 433. <sup>1</sup> Act of March 3, 1891, ch. 517, § 12 (26 St. at L. 829). See *supra*, §§ 361, 363, 363a, 364.

where the writ is set out at length. Adm. Rule 13, 2d Ct.

**§ 434. Limitation of liability — Petition.**— Proceedings to secure the limitation of liability given to shipowners by the Act of 1851 (§§ 4283 to 4289 of the Revised Statutes) and amendments<sup>1</sup> are begun by the filing of a libel or petition<sup>2</sup> in the District Court<sup>3</sup> for the district in which the vessel or owners have been sued, or in which, if suit has not been brought, the vessel then is.<sup>4</sup> The libel or petition should set forth the facts and circumstances on which the limitation is claimed, and pray proper relief. As soon as the petition is filed the court will grant an order, either appointing appraisers to appraise the amount or value of the interest of the owner or owners in such vessel and her freight for the voyage, or referring it to a commissioner to take proofs of such value.<sup>5</sup> Notice of the application for the appointment of appraisers or of the reference to ascertain values must be given to all persons who have brought suit. When the value has been ascertained to the satisfaction of the court, it will make an order for the payment of the amount into court, or for the giving of a stipulation with sureties for the payment thereof into court whenever ordered. If the owners so elect, the court will, without appraisal, make an order for the transfer by them of their interest in the vessel and freight to a trustee to be appointed by the court.<sup>6</sup>

**§ 435. Same — Monition.**— Upon the payment into court of the value ascertained, or the giving of a stipulation therefor, or the transfer to a trustee, as the case may be, the court must issue a monition against all persons claiming damages for the

**§ 434.** <sup>1</sup> 23 St. at L. 57; 24 St. at L. 80. Where there is but a single claim for damage the proceedings cannot be instituted, since the limitation of liability may be set up by answer in an action brought at common law. Hence the petition must show the existence or the probability of the existence of more than one claim for damage. *The Rosa*, 53 Fed. R. 132.

<sup>2</sup> The benefit of the act may also be secured by means of proper allegations in the answer. *The Scotland*, 105 U. S. 24. As to pleading, see *Butler v. Boston S. S. S. Co.*,

180 U. S. 527; *Black v. So. Pac. R. Co.*, 89 Fed. R. 565; *The Garden City*, 26 Fed. R. 766; *The Rosa*, 53 Fed. R. 132; *The Benefactor*, 108 U. S. 247; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578; *The Luckenback*, 26 Fed. R. 870; *The Annie Faxon* (C. C. A.), 75 Fed. R. 312; *s. c.* (D. C.), 66 Fed. R. 575.

<sup>3</sup> *The Mary Lord*, 31 Fed. R. 416.

<sup>4</sup> Adm. Rule 57; *In re Morrison*, 147 U. S. 14.

<sup>5</sup> *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 591.

<sup>6</sup> Adm. Rule 54.

loss on account of which limitation of liability is sought, citing them to appear and make due proof of their claims at or before a certain time to be named in the writ, not less than three months from the issuing of the same. Public notice of the monition must be given as in other cases, and notice must also be served through the post-office or otherwise as the court may direct; and on the application of the owners the court will make an order restraining the further prosecution of all suits against said owners in respect of any such claims.<sup>1</sup>

§ 436. **Same—Proof of claims.**—Proof of all claims presented in pursuance of the monition must be made before a commissioner to be designated by the court. Upon confirmation of the commissioner's report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court, or the proceeds of the ship and freight, after payment of costs and expenses, are divided *pro rata* among the several claimants in proportion to the amount of their respective claims proved and confirmed, saving to all parties any priority to which they may be legally entitled.<sup>1</sup>

§ 437. **Same—Answer—Trial.**—The owner may contest his liability, or the liability of his vessel, on the merits, for the damage claimed, independently of the limitation provided by the statutes, in which case he must state in his libel or petition the facts and circumstances by reason of which he claims exemption from liability.<sup>1</sup> And any person claiming damages who has presented his claim to the commissioner pursuant to the monition may file an answer to the petition contesting the right of the petitioner to either an exemption or a limitation of liability.<sup>2</sup> On the issues thus joined, the parties proceed to trial, the court first trying the case on the merits, and if it finds the petitioner liable for the loss or damage claimed, then trying the question of the petitioner's right to a limitation under the statutes.

§ 435. <sup>1</sup> Adm. Rule 54; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 592. The District Court may by a stay order enjoin the prosecution of proceedings pending in State courts where the petition is filed. *In re Long Island N. S. P. & F. Transp. Co.*, 5 Fed. R. 599; *Provi-*

*dence & N. Y. S. S. Co. v. Hill*, 109 U. S. 578, 600.

§ 436. <sup>1</sup> Adm. Rule 55; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 592.

§ 437. <sup>1</sup> *The Benefactor*, 103 U. S. 239; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578.

<sup>2</sup> Adm. Rule 56.

§ 438. **Proceedings on seizures.**—The Judiciary Act of 1789 gave the District Courts exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States,<sup>1</sup> but subsequent statutes have given the Circuit Courts jurisdiction of particular penalties and forfeitures.<sup>2</sup> In the District Court proceedings for the condemnation and sale of goods seized are *in rem*. Where the seizure was made on land, the court sits as a court of law with a jury; where the seizure was made on water, the court sits as a court of admiralty.

Proceedings in admiralty for a breach of the revenue, navigation, or other laws of the United States must be brought in the name of the United States.<sup>3</sup> Proceedings are begun by filing a libel of information in the district in which the property is seized. The information must state the place of seizure, and the district within which the property is brought, and where it then is.<sup>4</sup> It must propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute of the United States in such case provided, which must be specified.<sup>5</sup>

Upon the filing of the information a monition will issue, and the cause will proceed as in other suits in admiralty. Notice of the seizure and of the substance of the information must be published for fourteen days in a newspaper published near the place of seizure, and must also be posted for the same period at or near the place of trial.<sup>6</sup> Where a default is entered it is not necessary for the government to take proofs; a decree of condemnation and sale may be entered forthwith. Fifteen days' notice of sale is required.<sup>7</sup>

Property seized may be bonded by the claimant on notice to

§ 438. <sup>1</sup> U. S. R. S., § 563, clauses 3 and 8; U. S. v. Mooney, 116 U. S. 104.

<sup>2</sup> U. S. R. S., § 629, clauses 4, 5, 7, and 15; Coffey v. U. S., 116 U. S. 427.

<sup>3</sup> U. S. R. S., § 919.

<sup>4</sup> Adm. Rule 22. In case of a seizure, the libel should set forth the place of the seizure and the place where the violations of the statute were committed. U. S. v. One Raft, 13 Fed. R. 796.

<sup>5</sup> *Supra*, § 394; Adm. Rule 22; Coffey v. U. S., 116 U. S. 427, 435. It

has been held that it is unnecessary to state specifically that acts or omissions which are described in the language of the statute were done or omitted "contrary to the form of the statute in such case made and provided." The Idaho, 29 Fed. R. 187. For a libel that was held to be insufficient, see U. S. v. The Haytian Republic, 57 Fed. R. 508; s. c. (C. C. A.), 59 Fed. R. 476.

<sup>6</sup> U. S. R. S., § 923.

<sup>7</sup> U. S. R. S., § 930.

the collector of customs and the United States attorney.<sup>8</sup> When judgment is rendered for the claimant, but the court certifies that there was reasonable cause of seizure, the claimant is not entitled to costs.<sup>9</sup>

§ 439. **Proceedings in prize causes.**—The District Court has original and exclusive jurisdiction in prize causes.<sup>1</sup> The Prize Act, passed by Congress June 30, 1864, now embodied in Title LIV. of the Revised Statutes,<sup>2</sup> authorizes the District Courts to appoint three prize-commissioners in each district, one of whom must be a retired naval officer.<sup>3</sup> It is their duty to receive from the captors the documents found on board the captured ship, or having reference to the captured property, and return them to the court with the affidavit of the prize-master that they are in the same condition as delivered to him; also to examine the prize property as soon as it comes within the district, secure it by seals, and report to the court whether any part of it is in a condition requiring immediate sale, and anything relating to its condition, custody, or disposal which may require action by the court. They are also required to take the depositions of the persons captured with, or who claim, the captured property, upon standing interrogatories prescribed by the court.<sup>4</sup>

These depositions are returned by the commissioner to the court, and, with the documentary evidence obtained from the captured property, constitute the only evidence on which the cause is heard in the first instance. If upon this evidence the case is doubtful, the court may require further proofs to be taken; but in no case are witnesses examined orally before the court.<sup>5</sup>

At any time after the property is brought within the jurisdiction of the court a libel may be filed for its condemnation.<sup>6</sup> The proceeding must be *in rem*. Where the capture has been made by a public vessel of the United States the libel is filed in the name of the United States by the district attorney.<sup>7</sup>

<sup>8</sup> U. S. R. S., §§ 938 and 940.

<sup>9</sup> U. S. R. S., § 970.

§ 439. <sup>1</sup> U. S. R. S., § 563, cl. 8.

<sup>2</sup> U. S. R. S., §§ 4613–4652.

<sup>3</sup> U. S. R. S., § 4621.

<sup>4</sup> U. S. R. S., § 4622.

<sup>5</sup> *The Dos Hermanos*, 2 Wheat. 76; *The Sir William Peel*, 5 Wall. 517; *The Ambrose Light*, 25 Fed. R. 408.

<sup>6</sup> U. S. R. S., § 4618.

<sup>7</sup> *The Palmyra*, 12 Wheat. 1; *Jecker v. Montgomery*, 18 How. 110, 124.

Where the capture is made by a privateer, the proceeding is begun in the name of the captors by their own proctors.

Upon the filing of the libel a monition will issue, which, in case the captured property is in port, is served by the marshal in the same way as in proceedings for forfeiture under the revenue laws. If the property is not in port, as, for example, where it has been carried into a foreign port and there delivered upon bail by the captors, the monition must be served on the parties in interest, their agent, or proctor, if known to reside in the district; otherwise by publication daily in one of the newspapers of the port for ten successive days preceding the return.<sup>8</sup>

Any person interested in the property who wishes to contest the capture or procure restitution of the property captured, must file a claim thereto under oath. If on the return-day no claim is interposed, a default will be entered, and the property condemned. Suspension of proceedings for a year and a day after the default is allowed only where it is doubtful, upon the evidence, whether the captured property belongs to the enemy or is neutral.<sup>9</sup>

Prize property will not be delivered to the claimant on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property, and has given the captors leave to take further proofs, or where the claimant satisfies the court that the property has a peculiar and intrinsic value to him, independent of its market value. In such a case the court may deliver the property on stipulation or deposit of its value, if satisfied that the rights and interests of the United States and the captors, or of other claimants, will not be prejudiced thereby; but a satisfactory appraisement must first be made, and an opportunity given to the district attorney and the naval prize-commissioner to be heard as to the appointment of appraisers.<sup>10</sup>

By consent of the captors and claimants, or upon proof that the cargo is perishing, perishable, or liable to deteriorate or

<sup>8</sup> Prize Rules S. D. of N. Y., Rule 44.

<sup>10</sup> U. S. R. S., § 4626.

<sup>9</sup> *The Julia*, 2 Spr. 164; *The Falcon*, Blatchf. Prize Cas. 52.



depreciate, or whenever the costs of keeping the same are disproportionate to its value, the court will order a sale by the marshal, the proceeds of which must be deposited with the assistant treasurer nearest to the place of sale, subject to the order of the court.<sup>11</sup>

The decree of the court is either for condemnation or for acquittal and restitution. In case of condemnation the court will order testimony to be taken to show who are entitled to share in the distribution, and upon such testimony will make the final decree. In case of acquittal the court will decree delivery of the property or its proceeds, if it has been sold to the claimant, and may award damages against the captors, which will be assessed by commissioners appointed on motion.<sup>12</sup> Where there was probable cause for the seizure, damages are denied.<sup>13</sup>

An appeal lies from the final decree of the District Court direct to the Supreme Court, irrespective of the amount involved.<sup>14</sup> It must be taken within thirty days after the rendering of the decree.<sup>15</sup>

<sup>11</sup> U. S. R. S., §§ 4627 and 4629; *The Pioneer*, Blatchf. Prize Cas. 61; *The Sarah and Caroline*, id. 123.

*Rodrigues*, 174 U. S. 510; *The Buena Ventura*, 175 U. S. 884, 895.

<sup>13</sup> *The Thompson*, 8 Wall. 155.

<sup>12</sup> *The Anna Maria*, 2 Wheat. 327; *The Ambrose Light*, 25 Fed. R. 408, 447. As to costs, see *The Olinde*

<sup>14</sup> 26 St. at L. 827, § 5; *The Paquete Habana*, 175 U. S. 677.

<sup>15</sup> U. S. R. S., § 1009; *The Neustra Señora de Regla*, 17 Wall. 29.

## CHAPTER XXXI.

### COURT OF CLAIMS.

**§ 440. Organization of Court of Claims.**—The statutory provisions providing for the organization of the Court of Claims are as follows:

“The Court of Claims, established by the Act of February twenty-four, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office, and shall be entitled to receive an annual salary of four thousand five hundred dollars, payable quarterly from the Treasury.”<sup>1</sup> “Any three judges of the Court of Claims shall constitute a quorum: *Provided*, That the concurrence of three judges shall be necessary to the decision of any case.”<sup>2</sup>

“The Court of Claims shall have a seal, with such device as it may order.”<sup>3</sup> “It shall be the duty of the Speaker of the House of Representatives to appropriate such rooms in the Capitol at Washington, for the use of the Court of Claims, as may be necessary for their accommodation, unless it appears to him that such rooms cannot be so appropriated without interfering with the business of Congress. In that case the court shall procure at the city of Washington such rooms as may be necessary for the transaction of their business.”<sup>4</sup>

“The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a messenger. The clerks shall take an oath for the faithful discharge of their

§ 440. <sup>1</sup> U. S. R. S., § 1049. An interesting article on the History, Jurisdiction, and Practice in the Court of Claims, by Judge W. A. Richardson, was published in 7 S. L. Rev.

(N. S.) 781, and reprinted in 17 Ct. of Cl. 1.

<sup>2</sup> 18 St. at L. 252.

<sup>3</sup> U. S. R. S., § 1050.

<sup>4</sup> U. S. R. S., § 1051.

duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.”<sup>5</sup>

“The salary of the chief clerk shall be three thousand dollars a year, of the assistant clerk two thousand dollars a year, of the bailiff fifteen hundred dollars a year, and of the messenger eight hundred and forty dollars a year, payable quarterly from the treasury.”<sup>6</sup> “The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the Secretary of the Treasury.”<sup>7</sup>

“The said clerk shall have authority, when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the Treasury in the same way as the accounts of other disbursing agents of the Government are settled.”<sup>8</sup>

“On the first day of every December session of Congress the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of Departments, to the Solicitor, the Comptrollers, and the Auditors of the Treasury, to the Commissioners of the General Land Office and of Indian Affairs, to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States.”<sup>9</sup>

“Members of either House of Congress shall not practice in the Court of Claims.”<sup>10</sup>

<sup>5</sup> U. S. R. S., § 1053.

<sup>6</sup> U. S. R. S., § 1054.

<sup>7</sup> U. S. R. S., § 1055.

<sup>8</sup> U. S. R. S., § 1056.

<sup>9</sup> U. S. R. S., § 1057.

<sup>10</sup> U. S. R. S., § 1058.

§ 441. Statutes concerning the jurisdiction of Court of Claims.—The more important statutory provisions defining the jurisdiction of the Court of Claims are as follows:

By the Tucker Act of March 3, 1891, it is provided: "The Court of Claims shall have jurisdiction to hear and determine the following matters:

"*First.* All claims founded upon the Constitution of the United States, or any law of Congress,<sup>1</sup> except for pensions, or upon any regulation of an Executive Department,<sup>2</sup> or upon any contract, expressed or implied,<sup>3</sup> with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

"*Second.* All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."<sup>4</sup> The Revised Statutes also give this court jurisdiction over —

"*Third.* The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States or of his administrators or executors, for relief from responsibility, on account of capture or otherwise, while in the

§ 441. <sup>1</sup> *Infra*, § 442.

<sup>2</sup> The words, "regulation of an Executive Department," mean a rule made by the head of a Department for its action when authorized by Congress to make such rule. A mere

order of the President or the head of a Department is not a "regulation." *Harvey v. U. S.*, 8 Ct. Cl. 38; *Maddux v. U. S.*, 20 Ct. Cl. 193.

<sup>3</sup> *Infra*, § 442.

<sup>4</sup> 24 St. at L. 505; *infra*, § 443.

line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.<sup>5</sup> *Fourth.* Of all claims for the proceeds of captured or abandoned property, as provided by the Act of March twelve, eighteen hundred and sixty-three, chapter one hundred and twenty, entitled 'An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' or by the Act of July two, eighteen hundred and sixty-four, chapter two hundred and twenty-five, being an Act in addition thereto: *Provided*, That the remedy given in cases of seizure under the said Acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said Acts from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: (*Provided also*, That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy engaged in the suppression of the Rebellion.")<sup>6</sup>

"All petitions and bills praying or providing for the satisfaction of private claims against the Government founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the House in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims."<sup>7</sup>

<sup>5</sup>The term "disbursing officers" is not limited to officers of the army and navy, but extends to disbursing officers of the Executive Department. *Hobbs v. U. S.*, 17 Ct. Cl. 189. An officer cannot obtain relief against the United States for "losses suffered by the officer through forgery committed by his employees or others, for which he would in law be entitled to recover against both the forger and the depository who paid

the forged checks." *Hall v. U. S.*, 9 Ct. Cl. 270, 274.

<sup>6</sup>U. S. R. S., § 1059.

<sup>7</sup>U. S. R. S., § 1060. "There is an important difference between the transmission of the secretary of the Senate or the clerk of the House of bills and petitions upon which no action is taken, and referring claims by a formal resolution of the Senate or House of Representatives, and that difference is provided for in the

"Upon the trial of any cause in which any set-off, counter-claim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided by law. Any transcript of such judgment, filed in the clerk's office of any District or Circuit Court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such courts are enforced."<sup>8</sup>

"Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts."<sup>9</sup>

"Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or de-

respective sections 1059 and 1060, and is recognized in section 1062." *Webb v. U. S.*, 20 Ct. Cl. 487, 493.

<sup>8</sup> U. S. R. S., § 1061; *infra*, § 442.

<sup>9</sup> U. S. R. S., § 1062. The words "without fault or negligence on the part of such officer," mean such care and diligence as a prudent man would exercise in the discharge of a high public trust, or in a matter of private interest under similar circumstances. *Malone v. U. S.*, 5 Ct.

Cl. 486; *Glenn v. U. S.*, 4 Ct. Cl. 501; *Howell v. U. S.*, 7 Ct. Cl. 512; *Hall v. U. S.*, 9 Ct. Cl. 270; *Holman v. U. S.*, 11 Ct. Cl. 642; *Clark v. U. S.*, 11 Ct. Cl. 698; *Curtis v. Banker*, 136 Mass. 355; *Christian v. U. S.*, 7 Ct. Cl. 431; *Whittelsey v. U. S.*, 5 Ct. Cl. 452; *Prime v. U. S.*, 3 Ct. Cl. 209; *Murphy v. U. S.*, 3 Ct. Cl. 212; *Hobbs v. U. S.*, 17 Ct. Cl. 189; *Scott v. U. S.*, 18 Ct. Cl. 1; *Hoyle v. U. S.*, 21 Ct. Cl. 300.



nied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.”<sup>10</sup>

“All cases transmitted by the head of any Department, or upon the certificate of any Auditor or Comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.”<sup>11</sup>

“The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists the judgment or decree shall be paid in the same manner as other judgments of the said court.”<sup>12</sup>

“When a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found the court shall not enter judgment thereon, but shall report its findings and opin-

<sup>10</sup> U. S. R. S., § 1063. This statute is still in force and allows judgment in favor of the claimant. U. S. v. New York, 160 U. S. 598.

<sup>11</sup> U. S. R. S., § 1064.

<sup>12</sup> U. S. R. S., § 1065.

ions to the Department by which it was transmitted for its guidance and action.”<sup>13</sup>

“That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled ‘An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,’ approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.”<sup>14</sup>

“When any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions

<sup>13</sup>The Bowman Act of March 3, 1883, 22 St. at L. 485, § 2. This statute is still in force. *U. S. v. New York*, 160 U. S. 598. The reference of a claim by a department to the Court of Claims, without jurisdiction to pay, does not give the court jurisdiction. *Hart v. U. S.*, 118 U. S. 62. A claim may be referred to the Court of Claims by an executive department, after the accounting officers have certified a balance in favor of the claimant. “It never could have been intended by Congress that in such cases the United States were to assume the burden of proof to establish the errors of their accounting officers, instead of requiring claimants to prove their whole case.” *McKnight v. U. S.*, 13 Ct. Cl. 292. See also *Delaware River S. B. Co. v. U. S.*,

5 Ct. Cl. 55; *Winnisimmet Co. v. U. S.*, 12 Ct. Cl. 319. If, after the head of an executive department or the Secretary of the Treasury has transmitted a claim to the Court of Claims under section 1063 of the Revised Statutes, the claimant does not voluntarily prepare and file his petition, the court will, on motion, require him to do so. *Bright v. U. S.*, 6 Ct. Cl. 118; s. c., 8 Ct. Cl. 326. The court cannot decline jurisdiction if the case comes within the statute. *Ibid.* The Court of Claims will take jurisdiction of an agreed case which the head of a department certifies to be correct and sufficient. *Broulatour v. U. S.*, 7 Ct. Cl. 555; *Amoskeag Mfg. Co. v. U. S.*, 6 Ct. Cl. 99; s. c. as *Mfg. Co. v. U. S.*, 17 Wall. 592.

<sup>14</sup>24 St. at L. 505, § 13.

of law shall have been found, the court shall report its findings to the Department by which it was transmitted.”<sup>15</sup>

“Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or House may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or the House by which the case was transmitted for its consideration.”<sup>16</sup>

“Whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the Act approved March third, eighteen hundred and eighty-three, entitled ‘An Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,’ and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim, or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.”<sup>17</sup>

“Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety,

<sup>15</sup> 24 St. at L. 505, § 12.

<sup>16</sup> 22 St. at L. 485, § 1. Cf. U. S. v. New York, 160 U. S. 598.

<sup>17</sup> 24 St. at L. 505, § 14. It has been held that a claim against the District

of Columbia cannot be referred to the Court of Claims by one House of Congress. *Strachan v. District of Columbia*, 20 Ct. Cl. 484.

or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney-General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.”<sup>18</sup>

“When any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal

<sup>18</sup> 24 St. at L. 505, § 2.

to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment or claim as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable despatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary, with six per cent interest thereon for the time it has been withheld from the plaintiff.”<sup>19</sup>

“That such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French Government, arising out of illegal captures, detentions, seizures, condemnations, and confiscations prior to the ratification of the convention between the United States and the French Republic concluded on the thirtieth day of September, eighteen hundred, the ratifications of which were exchanged on the thirty-first day of July following, may apply by petition to the Court of Claims, within two years from the passage of this act, as hereinafter provided: *Provided*, That the provisions of this act shall not extend to such claims as were embraced in the convention between the United States and the French Republic concluded on the thirtieth day of April, eighteen hundred and three; nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain concluded on the twenty-second day of February, eighteen hundred and nineteen; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the fourth day of July, eighteen hundred and thirty-one.

“Sec. 2. That the court is hereby authorized to make all

<sup>19</sup> 18 St. at L. 481.

needful rules and regulations, not contravening the laws of the land or the provisions of this act, for executing the provisions hereof.

“Sec. 3. That the court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and, if by assignee, the date of the assignment, with the consideration paid therefor: *Provided*, That in the course of their proceedings they shall receive all suitable testimony on oath or affirmation, and all other proper evidence, historic and documentary, concerning the same; and they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor.

“Sec. 4. That the court shall cause notice of all petitions presented under this act to be served on the Attorney-General of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this act, and to be heard by the court. He shall resist all claims presented under this act by all proper legal defenses.

“Sec. 5. That it shall be the duty of Secretary of State to procure as soon as possible after the passage of this act, through the American minister at Paris or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad, which, together with like evidence and documents on file in the Department of State, or which may be filed in the Department, may be used before the court by the claimants interested therein, or by the United States, but the same shall not be removed from the files of the court; and after the hearings are closed the record of the proceedings of the court and the documents produced before them shall be deposited in the Department of State.

“Sec. 6. That on the first Monday of December in each year the court shall report to Congress for final action the facts found by it, and its conclusions in all cases which it has disposed of and not previously reported. Such finding and report of the court shall be taken to be merely advisory as to the law



and facts found, and shall not conclude either the claimant or Congress; and all claims not finally presented to said court within the period of two years limited by this act shall be forever barred; and nothing in this act shall be construed as committing the United States to the payment of any such claims.”<sup>20</sup>

Other special statutes give the Court of Claims jurisdiction in certain cases.<sup>21</sup>

“The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.”<sup>22</sup>

“No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.”<sup>23</sup>

“Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction.”<sup>24</sup>

§ 442. **Decisions on jurisdiction of Court of Claims.**—The following decisions on the jurisdiction of the Court of Claims may be of some assistance to the practitioner. It has been said that to constitute an implied contract upon which a suit can be brought in the Court of Claims, “there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was re-

<sup>20</sup> 23 St. at L., p. 283, ch. 25.

<sup>21</sup> See, for example, 20 St. at L. 171, 824; 21 St. at L. 784; 22 St. at L. 284, 469; 23 St. at L. 242, 257, 372, 381.

<sup>22</sup> U. S. R. S., § 1066. See, however, the act to provide for the adjudica-

tion and payment of claims arising from Indian depredations, 26 St. at L. 851, ch. 538.

<sup>23</sup> U. S. R. S., § 1067.

<sup>24</sup> U. S. R. S., § 1068.

ceived, as in the case of money paid by mistake.”<sup>1</sup> With the exception of claims for the proceeds of captured or abandoned property and others arising under special statutes, the Court of Claims has no jurisdiction of claims upon torts committed by the United States,<sup>2</sup> unless where the claimant can waive the tort and sue upon an implied contract.<sup>3</sup>

§ 442. <sup>1</sup> *Knote v. U. S.*, 95 U. S. 149, 157.

<sup>2</sup> U. S. R. S., § 1059; *Langford v. U. S.*, 101 U. S. 841; *Nichols v. U. S.*, 7 Wall. 122; *Gibbons v. U. S.*, 8 Wall. 269; *Dennis v. U. S.*, 2 Ct. Cl. 210; *Dykes v. U. S.*, 16 Ct. Cl. 869.

“The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law, but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law. The reason of this restriction is very obvious on a moment’s reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not

intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, as well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.” Miller, J., in *Langford v. U. S.*, 101 U. S. 841.

Where a statute which authorized a suit against the United States for a continuous tort was repealed pending such a suit, it was held that the damages sustained up to the time of the repeal only could be recovered. *Paine L. Co. v. U. S.*, 55 Fed. R. 854.

<sup>3</sup> *Ingram v. U. S.*, 82 Ct. Cl. 147, 162, per Nott, C. J.: “The common law reduces all civil actions between individuals to two simple classes, *ex contractu* and *ex delicto*. There are many subdivisions of the former, but generally it may be said that what is not *ex delicto* is *ex contractu*. It is the opinion of this court that Congress used the language ‘upon any contract, expressed or implied,’ with reference to this general classification of the common law. The meaning is that the court shall have jurisdiction of all actions *ex contractu* whether the contract be express or implied, but shall not have jurisdiction of actions *ex delicto*.”

When the United States takes possession of property, asserting a title hostile to that of the true owner, such owner cannot recover the reasonable value of the use, or the reasonable value of the fee of the same, in a suit in the Court of Claims, or in a Circuit or District Court of the United States. On the other hand, "when the Government of the United States, by such formal proceedings as are necessary to bind the Government, takes for public use, as for an arsenal, custom-house, or fort, land to which it asserts no claim or title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value."<sup>4</sup> So, neither the Court of Claims nor any other court has jurisdiction of an action against the United States,<sup>5</sup> or against any officer thereof,<sup>6</sup> to enjoin the

The United States are not liable for injury resulting from the negligence of their officers to those who are not in a contractual or a *quasi*-contractual relation with them. *German Bank of Memphis v. U. S.*, 148 U. S. 573. Thus, where the Register of the Treasury canceled registered bonds without authority of law, a party who bought them on the faith of such cancellation and subsequently was obliged to repay their value to the original owner, was not allowed to recover from the United States the amount for which he was thus mulcted. *Ibid.* The United States are not liable for damage to a water right, *Gibson's Case*, 29 Ct. Cl. 18; nor to land, *Hayward's Case*, 30 Ct. Cl. 219, where there is no contract upon the subject. But where the United States agreed to furnish a cofferdam to a contractor who was to construct a public work, it was held that they were liable for damage caused by negligence in such construction, although there was no stipulation in the contract to that effect. *Collins & Farwell v. U. S.*, 34 Ct. Cl. 294.

<sup>4</sup> *Miller, J.*, in *Langford v. U. S.*, 101 U. S. 341. See *Hill v. U. S.*, 149 U. S. 593; *Great Falls Mfg. Co. v.*

*Atty. Gen.*, 124 U. S. 581; *U. S. v. Russell*, 13 Wall. 623; *Grant v. U. S.*, 1 Ct. Cl. 41; *Hollister v. Benedict & B. Mfg. Co.*, 113 U. S. 59, 67; *Mills v. U. S.*, 19 Ct. Cl. 79; *Kettler v. U. S.*, 21 Ct. Cl. 175. The filing of a petition in the Court of Claims under a statute providing that in that manner damages may be recovered for the taking of private property for public use, is a waiver of an objection by the plaintiff to the alleged unconstitutionality of such statute. *Great Falls Mfg. Co. v. Atty. Gen.*, 124 U. S. 581; *U. S. v. Great Falls Mfg. Co.*, 113 U. S. 645. The owner of a well near to, but not on the line of, the Washington aqueduct, which was destroyed by the construction of the aqueduct, may recover its value from the United States under 22 St. at L. 168 (Act of July 15, 1882). *U. S. v. Alexander*, 148 U. S. 186; *U. S. v. Truesdell*, 148 U. S. 196. In a proceeding to condemn the locks and dams of a corporation, the value of the franchise to take tolls for their use must be included in the compensation. *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312.

<sup>5</sup> *U. S. v. Palmer*, 128 U. S. 262, 269.

<sup>6</sup> *Belknap v. Schild*, 161 U. S. 10; *Dashiell v. Grosvenor (C. C. A.)*, 66

infringement of a patent, or to recover profits or damages from such an officer on account of the use of the article by him in his official character where he derived no personal benefit from such use.<sup>7</sup> Nor to recover such profits from the United States for such a use when made without any express or implied recognition of the rights of the patentee and against his protest.<sup>8</sup> But where the United States has adopted an improvement covered by a patent at the request of the patentee, with notice that he claims a patent-right to the same, and with no assertion of a right to use the same without compensation, the patentee may recover a reasonable royalty for the use of the patent, in a suit in the Court of Claims founded upon a contract implied from the transaction.<sup>9</sup>

The Tucker Act of March 3, 1887, does not give the Court of Claims jurisdiction of suits against the United States to establish land claims, or to enforce the specific performance of contracts.<sup>10</sup> No suit can be sustained merely upon moral or equitable considerations, not based upon any established rule of law or equity.<sup>11</sup> The Court of Claims has no power to make a rule requiring parties to present their claims to an Executive Department before suit. Such a rule is void.<sup>12</sup> An officer may sue to recover a salary allowed by an Act of Congress.<sup>13</sup> An owner of bonds, assumed by the United States, may maintain an action in the Court of Claims to collect the amount of the same.<sup>14</sup> A statute which confers exclusive authority upon a public officer over certain questions or claims deprives the Court of Claims of jurisdiction concerning the same.<sup>15</sup> Where

Fed. R. 334. *Cf.* *James v. Campbell*, 104 U. S. 356; *supra*, § 86. But see *Head v. Porter*, 48 Fed. R. 481.

<sup>7</sup> *Belknap v. Schild*, 161 U. S. 10.

<sup>8</sup> *Schillinger v. U. S.*, 155 U. S. 163. So as to the use of a copyright. *Lauman's Case*, 27 Ct. Cl. 260. But see *Hollister v. Benedict & B. Mfg. Co.*, 113 U. S. 59.

<sup>9</sup> *U. S. v. Palmer*, 128 U. S. 262. But see *Hartman's Case*, 85 Ct. Cl. 106; *Russel & Livermore's Case*, 85 Ct. Cl. 154; *Eager's Case*, 85 Ct. Cl. 556; *Coston's Case*, 83 Ct. Cl. 438.

<sup>10</sup> *U. S. v. Jones*, 181 U. S. 1; *supra*, § 36.

<sup>11</sup> *Bonner v. U. S.*, 9 Wall. 156; *MoClure v. U. S.*, 116 U. S. 145; *Tillson v. U. S.*, 100 U. S. 43.

<sup>12</sup> *Clyde v. U. S.*, 18 Wall. 88.

<sup>13</sup> *Moore v. U. S.*, 4 Ct. Cl. 139.

<sup>14</sup> *Morrell v. U. S.*, 7 Ct. Cl. 421.

<sup>15</sup> *Davidson v. U. S.*, 21 Ct. Cl. 298; *Daily v. U. S.*, 17 Ct. Cl. 144; *Marshall v. U. S.*, 21 Ct. Cl. 307; *Chesapeake & O. Ry. Co. v. U. S.*, 20 Ct. Cl. 49; *Alire v. U. S.*, 1 Ct. Cl. 233; *s. c.*, 7 Ct. Cl. 27; *Bofinger v. U. S.*, 18 Ct. Cl. 148, 165; *Dorsheimer v. U. S.*, 7 Wall. 166.

an officer is directed by statute to examine claims, to report to Congress and to await further legislative action, no suit can be maintained on his report.<sup>16</sup> Where Congress recognizes the validity of a claim, appropriates money to pay the same, and directs a public officer to examine and pay it, a suit upon such claim against the United States may be maintained in the Court of Claims.<sup>17</sup> A suit may be maintained against the United States upon an allowance made by a Commissioner of Internal Revenue to a judgment creditor, under section 3220 of the Revised Statutes, where the collector does not object and sets up no claim himself;<sup>18</sup> provided, the Commissioner has not exceeded his jurisdiction in making the allowance.<sup>19</sup> A suit may be maintained to recover the amount of an award under a statute giving an informer a share of the penalty.<sup>20</sup> A suit may be maintained to recover of the United States taxes and penalties similar to those in sections 3220 and 3228 of the Revised Statutes, when a claim has been in due time presented on appeal to and allowed by the Commissioner of Internal Revenue;<sup>21</sup> and also of a suit for a drawback under the Act of August 5, 1861, chapter 45, section 4, after payment has been refused.<sup>22</sup>

It has been held that suits may be successfully maintained as upon implied contracts with the United States by a naval officer for his expenses when traveling under orders;<sup>23</sup> by a public officer such as the register of a land office on an implied contract for reasonable expenses necessary for the performance of his public duties, including rent and payments for janitor's services and fuel, except where a law limits or prohibits the same;<sup>24</sup> to recover money paid under the void judgment of a

<sup>16</sup> *Huffman v. U. S.*, 17 Ct. Cl. 55.

<sup>17</sup> *Blount v. U. S.*, 21 Ct. Cl. 274; *Huffman v. U. S.*, 17 Ct. Cl. 55. See *U. S. v. Jordan*, 113 U. S. 418; *Nashville, C. & St. L. Ry. Co. v. U. S.*, 113 U. S. 261; *U. S. v. Kaufman*, 96 U. S. 567.

<sup>18</sup> *Nixon v. U. S.*, 18 Ct. Cl. 448.

<sup>19</sup> *Seat v. U. S.*, 18 Ct. Cl. 458.

<sup>20</sup> *Ramsay v. U. S.*, 21 Ct. Cl. 443; *U. S. v. Ramsay*, 120 U. S. 214.

<sup>21</sup> *U. S. v. Savings Bank*, 104 U. S. 728. See also *U. S. v. Kaufman*, 96 U. S. 567.

<sup>22</sup> *Campbell v. U. S.*, 107 U. S. 407; *Portland Co. v. U. S.*, 5 Ct. Cl. 441.

<sup>23</sup> *U. S. v. McDonald*, 128 U. S. 471.

<sup>24</sup> *Luse v. U. S.*, 35 Ct. Cl. 164. For a case where letter carriers were allowed to recover upon an implied contract for working more than eight hours a day, see *San Francisco Mail Carriers' Case*, 33 Ct. Cl. 417. "The action of the auditing department, either in allowing or rejecting a claim, was not an essential prerequisite to the jurisdiction of the Court of Claims to hear it." *U. S. v. Knox*,

military commission;<sup>25</sup> of an illegal tax upon realty, paid for the purpose of obtaining possession of the same,<sup>26</sup> and money illegally exacted by a government officer, under such circumstances that the payment was necessary to avoid stopping the business in which the claimant was engaged;<sup>27</sup> to recover money paid to a public officer under a mutual mistake of fact;<sup>28</sup> but not money paid under a mutual mistake of law;<sup>29</sup> to recover money paid a land officer as part payment for a certificate of entry which he refuses to deliver, the consideration for the payment thus failing;<sup>30</sup> to recover money of the claimant received by the United States for other purposes, and appropriated by them for the payment of an illegal tax;<sup>31</sup> to recover money of the claimant obtained and paid into the Treasury by a fraud perpetrated by an officer of the United States;<sup>32</sup> to recover the value of property delivered in pursuance of an express contract which is void;<sup>33</sup> to recover the damage to property leased by the government and injured by the want of reasonable care while in its possession;<sup>34</sup> to recover for salvage services,<sup>35</sup> and for the share of general average reasonable due;<sup>36</sup> but not, it has been held, to recover damages for an injury due to the negligent operation of an elevator in a government building.<sup>37</sup> If two claimants seek to recover for the use of the same property, one cannot resist by a plea to the jurisdiction that the title to land is involved.<sup>38</sup>

The statute authorizing the Court of Claims to enter an

128 U. S. 230, 234, per Miller, J. "But if such claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken," unless there is unreasonable delay. *U. S. v. Fletcher*, 147 U. S. 661, 667, per Brown, J.

<sup>25</sup> *Devlin v. U. S.*, 12 Ct. Cl. 266. But see *Carver v. U. S.*, 111 U. S. 609.

<sup>26</sup> *Simons v. U. S.*, 19 Ct. Cl. 601.

<sup>27</sup> *Swift Co. v. U. S.*, 111 U. S. 22. See *N. Y. Consol. Card Co. v. U. S.*,

20 Ct. Cl. 174; *Dooley v. U. S.*, S. C. U. S., May 27, 1901.

<sup>28</sup> *Nelson v. U. S.*, 85 Ct. Cl. 427; *Ingram v. U. S.*, 82 Ct. Cl. 147.

<sup>29</sup> *U. S. v. Edmonston*, 181 U. S. 500; *U. S. v. Wilson*, 168 U. S. 273; *U. S. v. Lawson*, 101 U. S. 664.

<sup>30</sup> *Slocum v. U. S.*, 85 Ct. Cl. 485.

<sup>31</sup> *Johnston v. U. S.*, 17 Ct. Cl. 157.

<sup>32</sup> *U. S. v. State Bank*, 96 U. S. 80.

<sup>33</sup> *Heathfield v. U. S.*, 8 Ct. Cl. 213.

<sup>34</sup> *U. S. v. Bostwick*, 94 U. S. 53.

<sup>35</sup> *Bryan v. U. S.*, 6 Ct. Cl. 128; *McGowan v. U. S.*, 20 Ct. Cl. 147.

<sup>36</sup> *Brown v. U. S.*, 15 Ct. Cl. 392.

<sup>37</sup> *Bigby v. U. S.*, 103 Fed. R. 597.

<sup>38</sup> *Bright v. U. S.*, 6 Ct. Cl. 118; s. c., 8 Ct. Cl. 326.



affirmative judgment in favor of the United States against a suitor in the Court of Claims does not violate the Seventh Amendment of the Constitution.<sup>39</sup> This right is as comprehensive as the similar rights given to the Crown by the British Act of 1860 regulating Petitions of Right.<sup>40</sup>

The Court of Claims has jurisdiction to hear and determine a counter-claim by the United States for the proceeds of their property wrongfully sold by an insolvent debtor in a suit by his assignee in insolvency on a contract between the insolvent and the United States.<sup>41</sup> It has been held that the United States may take an assignment from A., its judgment debtor, of a judgment held by A. against B., and set off the same in a suit brought by B. upon an award of Congress, notwithstanding the fact that B. has assigned his award to C.; provided, the set-off was acquired before notice of the assignment.<sup>42</sup> Where a suit on a claim was brought by a firm of three, it was held that the United States could not set off a judgment against two of them.<sup>43</sup> After the government has allowed a claim and payment of a part to the assignees of the claimant, upon his receipt in full, the government, when sued for the balance, cannot set up as a counter-claim the amount so paid, on the ground that the assignment was irregularly executed.<sup>44</sup> Where an officer of the navy, upon settlement of his accounts, claimed that he would not be concluded thereby, and subsequently sued for a balance claimed by him, it was held that the United States was not bound by the settlement, and could obtain judgment for moneys improperly paid him in pursuance thereof.<sup>45</sup> If a claim is dismissed for want of jurisdiction, the counter-claim falls with it.<sup>46</sup>

The subjects of Great Britain,<sup>47</sup> of Belgium,<sup>48</sup> of France,<sup>49</sup> of

<sup>39</sup> *McElrath v. U. S.*, 102 U. S. 426, 440; s. c., 12 Ct. Cl. 312.

<sup>40</sup> 23 and 24 Vict. 17, ch. 84; *Roman v. U. S.*, 11 Ct. Cl. 761. See *Delancey v. The Queen*, 6 L. R. Exch. 286.

<sup>41</sup> *McElrath v. U. S.*, 102 U. S. 426; *U. S. v. Burchard*, 125 U. S. 176.

<sup>42</sup> *Boehm v. U. S.*, 21 Ct. Cl. 299.

<sup>43</sup> *Allen v. U. S.*, 17 Wall. 207, 5 Ct. Cl. 339; *Macauley v. U. S.*, 11 Ct. Cl. 693.

<sup>44</sup> *Macauley v. U. S.*, 11 Ct. Cl. 693.

<sup>45</sup> *Boehm v. U. S.*, 20 Ct. Cl. 142.

<sup>46</sup> *McKnight v. U. S.*, 98 U. S. 179, 18 Ct. Cl. 292.

<sup>47</sup> *U. S. v. O'Keefe*, 11 Wall. 178; *Carlisle v. U. S.*, 16 Wall. 147, 6 Ct. Cl. 398.

<sup>48</sup> *De Give v. U. S.*, 7 Ct. Cl. 517.

<sup>49</sup> *Rothschild v. U. S.*, 6 Ct. Cl. 204; *Dauphin v. U. S.*, 6 Ct. Cl. 221.

Italy,<sup>50</sup> of Prussia,<sup>51</sup> of Spain,<sup>52</sup> and of Switzerland,<sup>53</sup> may sue in the Court of Claims.<sup>54</sup> A foreign government does not deny the right of an American to sue it by requiring him to give security for costs.<sup>55</sup>

The Court of Claims has jurisdiction of an action to which a State is a party plaintiff;<sup>56</sup> but not of a suit to which a State is a necessary party defendant.<sup>57</sup>

**§ 443. Statute of limitations in Court of Claims.**—“Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during the marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.”<sup>1</sup>

The Tucker Act of March 3, 1887, provides that the Statute of Limitations shall not apply to claims referred to the Court of Claims by the head of a Department under section 1063 of the Revised Statutes, provided such claims were presented for settlement at the proper Department within six years after they accrued.<sup>2</sup> The Statute of Limitations does not apply to suits to establish a defense under sections 1059–1062 of the Revised Statutes.<sup>3</sup> An action for money received by the United States must be brought within six years after its reception.<sup>4</sup> Where money is not payable until demand, the statute does

<sup>50</sup> *Fichera v. U. S.*, 9 Ct. Cl. 254.

<sup>51</sup> *Brown v. U. S.*, 5 Ct. Cl. 571.

<sup>52</sup> *Molina v. U. S.*, 6 Ct. Cl. 269.

<sup>53</sup> *Lobsiger v. U. S.*, 5 Ct. Cl. 687.

<sup>54</sup> U. S. R. S., § 1068.

<sup>55</sup> *Brown v. U. S.*, 5 Ct. Cl. 571.

<sup>56</sup> *U. S. v. Louisiana*, 123 U. S. 82; s. c., 127 U. S. 182.

<sup>57</sup> *Milwaukee R. R. Canal Co. v. U. S.*, 1 Ct. Cl. 187. See *supra*, § 37.

§ 443. <sup>1</sup> U. S. R. S., § 1069.

<sup>2</sup> *U. S. v. Lippitt*, 100 U. S. 663; *Winisimmet Co. v. U. S.*, 12 Ct. Cl. 319.

<sup>3</sup> *U. S. v. Clark*, 96 U. S. 37.

<sup>4</sup> *Clark v. U. S.*, 99 U. S. 493.

not begin to run until the payment is made.<sup>5</sup> It has been held that the statute begins to run on a claim for services, when presented.<sup>6</sup> A claim for the price of property sold is barred within six years after the delivery of the property, not from the time when the Department refused to allow the payment, unless payment by the terms of the contract was postponed.<sup>7</sup> An officer whose accounts are settled annually is entitled to the balance due at the end of each fiscal year.<sup>8</sup> A State cannot sue to recover the proceeds of swamp lands which have been credited to the State on the Treasury books more than six years before the suit was brought.<sup>9</sup> The statute does not begin to run on a claim for extra work under a building contract contemplating the same, until the whole contract is performed.<sup>10</sup>

An item in the account of a court commissioner for fees was held barred when the services for which he charged were rendered more than six years before proceedings.<sup>11</sup> No officer can waive the statute, and the court must take notice that the claim is barred, if that appears.<sup>12</sup> Acknowledgments and promises by executive officers without legislative authority do not prevent the running of the statute.<sup>13</sup> If an act appropriating money to pay a barred claim allows the claimant to sue under it, it takes the claim out of the statute.<sup>14</sup> The plaintiff's ignorance of his ability to establish his claim does not prevent the statute from running.<sup>15</sup> When the statute once begins to run, no subsequently occurring disability, such as insanity, suspends it.<sup>16</sup> The claimant's death does not interrupt the statute if the claim accrued during his life.<sup>17</sup> If the claimant dies before the claim accrues, the statute does not begin to run until the appointment of an administrator.<sup>18</sup> Inability to sue by reason of aid given to the Confederacy by the claimant does not prevent the running of the statute.<sup>19</sup> When the United States submit to

<sup>5</sup> *Harrison v. U. S.*, 20 Ct. Cl. 175;  
*U. S. v. Cooper*, 120 U. S. 124. See  
*U. S. v. Lawton*, 110 U. S. 146.

<sup>6</sup> *U. S. v. Wilder*, 18 Wall. 254;  
*Titus v. U. S.*, 16 Ct. Cl. 276.

<sup>7</sup> *Battelle v. U. S.*, 7 Ct. Cl. 297.

<sup>8</sup> *Ellsworth v. U. S.*, 14 Ct. Cl. 382;  
*U. S. v. Ellsworth*, 101 U. S. 170.

<sup>9</sup> *U. S. v. Louisiana*, 127 U. S. 182.

<sup>10</sup> *U. S. v. Gibbons*, 109 U. S. 200.

<sup>11</sup> *Patterson v. U. S.*, 21 Ct. Cl. 322.

<sup>12</sup> *Finn v. U. S.*, 123 U. S. 227.

<sup>13</sup> *Leonard v. U. S.*, 18 Ct. Cl. 382.

<sup>14</sup> *Wray v. U. S.*, 19 Ct. Cl. 154.

<sup>15</sup> *Green v. U. S.*, 17 Ct. Cl. 174.

<sup>16</sup> *Whitney v. U. S.*, 18 Ct. Cl. 19;  
*Leonard v. U. S.*, 18 Ct. Cl. 382. See  
*McDonald v. Hovey*, 110 U. S. 619.

<sup>17</sup> *Sierra v. U. S.*, 9 Ct. Cl. 224.

<sup>18</sup> *Fulenweider v. U. S.*, 9 Ct. Cl.  
403.

<sup>19</sup> *Kendall v. U. S.*, 107 U. S. 123.

be sued in a State court, it seems that they may take advantage of the State statute of limitations.<sup>20</sup>

§ 444. **Petitions and parties plaintiff in Court of Claims.** "Suits will be commenced by petition, verified in the manner provided by law, and filed in the office of the clerk, with one extra copy in print or typewriting. The clerk will note thereon the day of filing, and will cause one copy to be forwarded to the Attorney-General. Within twenty days thereafter, the claimant will file in the clerk's office twenty-five printed copies of such petition and note of filing, unless the court, on motion, waives this requirement."<sup>1</sup>

The Revised Statutes provide that "A claimant shall, in all cases, fully set forth in his petition, the claim, the action therein, in courts or by any department, if such action has been had; what persons thereof have had or are interested therein; when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and where the claim has been assigned, the original and every prior owner thereof, if a citizen, has, at all times, borne true allegiance to the Government of the United States, and whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney."<sup>2</sup>

"The petition must comply with Revised Statutes, section 1072, and must also set forth: 1. The title of the action, with the full Christian and surnames of all the claimants. 2. A plain, concise statement of the facts and circumstances, giving place and date, free from argumentative and impertinent matter. 3. In every case transmitted by the head of a Department, by Congress or a committee thereof, a copy of the order of transmission shall be set out or annexed. 4. The prayer, in which the claimant must state distinctly the amount for

<sup>20</sup> Stanley v. Schwalby, 147 U. S. 508; *supra*, §§ 36, 131.

§ 444. <sup>1</sup> Ct. Cl. Rule 7.

<sup>2</sup> U. S. R. S., § 1072.

which he demands judgment, or the relief for which he prays.”<sup>3</sup> “When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the Executive Departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. A court will thereupon call upon the proper Department for such information or papers as it may deem necessary; and when the same are furnished, the petition may be amended; and the amended petition shall be printed and filed, and may take the place of the original petition.”<sup>4</sup>

“If the claimant be an executor or administrator, guardian or other representative, appointed by a judicial tribunal, a duly authenticated copy of the record of the appointment must be filed with the petition at the commencement of the action.”<sup>5</sup>

“If the claim be founded upon an act of Congress, or upon a regulation of an Executive Department, the act and the section thereof upon which the claimant relies must be specified, and the particular regulation of the Department must be stated in terms.”<sup>6</sup>

“If the claim be founded upon an express contract with the United States, such contract must be set forth in the petition, and, if it be in writing, must be annexed thereto. If it be founded upon an implied contract, the circumstances upon which the claimant relies to prove a contract must be specified. If it consists of several matters or items, each must be separately stated.”<sup>7</sup> “If the petition be verified by an attorney-at-law or other agent of the claimant, a power of attorney authorizing him to make the verification must be filed with it.”<sup>8</sup>

“If a claimant desire to amend his petition at any time, he must set forth in his motion the specific amendments desired.

• If the motion be allowed, he must within twenty days thereafter file a copy of the petition, with the amendments properly incorporated therein, unless the court order otherwise.”<sup>9</sup> “If it appear on the face of the petition that the claim first accrued

<sup>3</sup> Ct. Cl. Rule 7.

<sup>4</sup> Ct. Cl. Rule 8.

<sup>5</sup> Ct. Cl. Rule 9.

<sup>6</sup> Ct. Cl. Rule 10.

<sup>7</sup> Ct. Cl. Rule 11.

<sup>8</sup> Ct. Cl. Rule 12.

<sup>9</sup> Ct. Cl. Rule 13.

more than six years before the petition was filed, the claimant must aver therein the existence and period of duration of some disability recognized by law which prevented his filing his petition within that time; in default whereof it will be considered that no such disability existed, and the petition may be dismissed on motion.”<sup>10</sup> “If the claimant, in avoidance of the bar of limitation, aver in his petition the existence and duration of any such disability, and it thereby appears that, after the disability ended, more than three years had elapsed before the petition was filed, the petition may be dismissed on motion.”<sup>11</sup> “If upon the face of the petition it does not appear when the claim first accrued, the court may require the claimant to make the petition definite and certain in that regard, and in default thereof may dismiss the suit.”<sup>12</sup> “Within two months after the filing of a case transmitted to the court, or within such further time as the court may allow, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, in accordance with Rule 7.”<sup>13</sup>

“Any person claiming to be indirectly interested in any question involved in such case may, by leave of court, be permitted to appear and be heard on the one side or the other, as his interest may require, upon filing a petition, under oath, setting forth specifically and concisely how he claims to be so interested, and submitting the questions raised to the decision of the court.”<sup>14</sup> If no claimant, directly or indirectly interested, appears and files his petition within said two months, the Attorney-General, or Assistant Attorney-General, charged with defending the Government in this court, may set the case down for trial upon such evidence as he may submit.”<sup>15</sup>

“Within two months after the filing of a case transmitted to the court by Congress or either House, or by a committee, or within such further time as the court may allow, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, in accordance with Rule 7. Thereafter the case shall be proceeded with, in like manner, and subject to the same rules, as far as applicable, as other cases in the court under its general jurisdiction.”<sup>16</sup>

<sup>10</sup> Ct. Cl. Rule 70.

<sup>11</sup> Ct. Cl. Rule 71.

<sup>12</sup> Ct. Cl. Rule 72.

<sup>13</sup> Ct. Cl. Rule 98.

<sup>14</sup> Ct. Cl. Rule 94.

<sup>15</sup> Ct. Cl. Rule 95.

<sup>16</sup> Ct. Cl. Rule 96.



"In cases for stores and supplies the petition, or if already filed an amended petition, shall embrace the following: (a) An allegation as to loyalty of the party from whom the supplies were taken, or person furnishing same. (b) If the suit is by legal representative it must be alleged when and by what authority such party was appointed such representative. And it must be alleged that the claimant brings into court his warrant of authority. (c) It must be alleged that the claim was before the Southern Claims Commissioner, Quartermaster-General, or Commissary-General of Subsistence, and with what result, together with a brief statement of the ground given therefor. (d) It must show the items of account before said Commission or officers, and which of said items are now presented to this court. (e) It must be stated which House of Congress or committee referred the case, with the date thereof. (f) It must be stated what troops or command took or were furnished the supplies, when they were taken, and at what place taken."<sup>17</sup>

A married woman, who by the law of her domicile may hold property in equity, with or without a trustee, may sue in her own name,<sup>18</sup> even though her husband refuses to be a

<sup>17</sup> Ct. Cl. Rule 97. Petitions under the French Spoliation Act must conform to the following rules: "Parties having a common interest growing out of the seizure of the same vessel or its cargo, may unite in one petition for the recovery of their respective claims, which may be heard together. Where insurance was made in his own name by one for himself and others, or as agent for others, or by a keeper of an insurance office, in either case, or in case of an agent for underwriters, in respect of a policy or a loss thereunder from spoliation, his administrator, appointed in the jurisdiction of his last domicile, may file one petition on each policy for all the underwriters thereon, and the personal representatives of any one may file a petition for his decedent setting up the interests of all underwriters upon the same policy, and thereafter. On or before January 20, 1887, the representatives of any

or all the other underwriters on the policy may by motion be permitted to become parties to that petition, and they will be heard as to their respective interests after filing letters of administration. When the petition of the owners of a vessel or its cargo sets out an insurance thereof, the insurers may, under the same restrictions and in the same manner, on motion, prosecute their respective interests in the same case. Where claimants are firms or joint owners, the petition of the personal representative of the last survivor may be made in behalf of all, and the personal representatives of the others may come in and be heard in respect to their interests." Ct. Cl. Rule 105. "In all other respects the general rules of the court shall, so far as applicable, be the rules under the French Spoliation Act." Ct. Cl. Rule 107.

<sup>18</sup> Meriwether v. U. S., 13 Ct. Cl. 259.

party, provided the laws of her domicile permit such a suit.<sup>19</sup> Minors should sue through a guardian appointed in the State of their domicile instead of through the guardian appointed in the State where their property is situated.<sup>20</sup> A corporation organized under the laws of a State in the Confederacy, for purposes not hostile to the government, may sue under the Captured and Abandoned Property Act.<sup>21</sup> A principal may sue in his own name, although the contract was made in the name of an agent.<sup>22</sup>

The Revised Statutes provide as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."<sup>23</sup>

<sup>19</sup> *Stanton v. U. S.*, 4 Ct. Cl. 456.

<sup>20</sup> *Ibid.*

<sup>21</sup> *U. S. v. Insurance Cos.*, 22 Wall. 99; *Home Ins. Co. v. U. S.*, 8 Ct. Cl. 449.

<sup>22</sup> *Ramsdell v. U. S.*, 2 Ct. Cl. 508.

<sup>23</sup> *U. S. R. S.*, § 8477. "The object of Congress by section 8477 was to protect the Government, and not the claimant, and to prevent fraud upon the Treasury." *Price v. Forrest*, 173 U. S. 410, 423, per Harlan, J., and cases cited by him. It does not invalidate contracts with attorneys for the prosecution of claims against the United States for or upon contingent fees. Such con-

tracts have been enforced when the compensation was one-twentieth, *Wylie v. Coxe*, 15 How. 415; one-tenth, *Wright v. Tebbitts*, 91 U. S. 252; one-fifth, *Stanton v. Embrey*, 93 U. S. 548; and one-half, *Taylor v. Bemiss*, 110 U. S. 42. See also *Davis v. Commonwealth*, 164 Mass. 241; *Bayard v. McLane*, 8 Harr. (Del.) 139; *Ryan v. Martin*, 16 Wis. 57; s. c., 18 Wis. 672; *Stanton v. Haskin*, 1 MacA. 558, 562; *Voorhees v. Dorr*, 51 Barb. 580. Such contracts, unless forbidden by a special statute, may be enforced by an action against the party to whom the payment is made.

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the

*Ibid.*; *York v. Conde*, 147 N. Y. 486. But see *Ball v. Halsell*, 161 U. S. 772; *Trist v. Child*, 21 Wall. 441. The statute does not apply to assignments by operation of the law to assignees in bankruptcy, *Erwin v. U. S.*, 97 U. S. 392; to assignees in insolvency, even under voluntary assignments, *Goodman v. Niblack*, 102 U. S. 556; *Butler v. Goreley*, 146 U. S. 303; nor to receivers appointed by State courts, *Price v. Forrest*, 173 U. S. 410; nor to persons who have a right of subrogation, *Am. Tobacco Co. v. U. S.*, 32 Ct. Cl. 207; *Schwarz v. U. S.*, 35 Ct. Cl. 303. All of these may sue the United States in their own name. *Ibid.* But the purchaser of a claim at a judicial sale under a mortgage cannot. *St. Paul & D. R. Co. v. U. S.*, 112 U. S. 733. Otherwise it was held of a sale by an assignee in bankruptcy. *McKay v. U. S.*, 27 Ct. Cl. 422. The statute does not enable the original claimant to recover of the United States a sum once paid by the Government to his attorney in fact under a power of attorney made before the allowance of the claim and the issue of the warrant, no notice of the revocation of which has been given to the United States. *Bailey v. U. S.*, 109 U. S. 432; *Buffalo B. R. Co. v. U. S.*, 16 Ct. Cl. 238. Nor does it invalidate a contract of partnership in furnishing supplies to the United States, nor a promise by one party to another that he will pay him a sum, already due under the articles of co-partnership, out of money to be received from the Government for such supplies. *Hobbs v. McLean*, 117 U. S. 567. Nor does it affect the right of a mortgagee of land or of a

pledgee of rents to recover from the mortgagor or pledgor the rents paid by the United States. *Freedmen's S. & Tr. Co. v. Shepherd*, 127 U. S. 494. It has been held that the statute does not apply to the claim of a witness against a marshal for witness fees paid to the marshal and withheld by him. *Bollin v. Blythe*, 46 Fed. R. 181, 183; *Wallace v. Douglas*, 116 N. C. 659. But that it applies to claims against a collector for duties illegally collected. *Hager v. Swayne*, 149 U. S. 242.

It seems that the statute does not invalidate the assignment of judgments against the United States or against collectors. *Burke v. Davis*, 63 Fed. R. 456, 458, 12 A. G. Op. 216. It seems that the statute does not invalidate an assignment made before the United States assumed the indebtedness, *U. S. v. Griswold*, 30 Fed. R. 604; s. c., 12 Sawyer, 398; and that it does not apply to claims against funds received from foreign governments by the State Department for distribution among citizens of the United States. *Hubbell v. U. S.*, 15 Ct. Cl. 546, 592. Otherwise the statute applies to every claim against the United States. *U. S. v. Gillis*, 95 U. S. 407; *McKnight v. U. S.*, 98 U. S. 179; *St. Paul & D. R. Co. v. U. S.*, 112 U. S. 733; *Hager v. Swayne*, 149 U. S. 242, 247; *Ball v. Halsell*, 161 U. S. 72, 79. No assignee of such can maintain a suit against the United States in any court. *Ibid.* And it was held that a negotiable draft by the claimant upon his attorneys, payable out of the proceeds of the claim, which was accepted by the attorneys before collection and transferred to a purchaser in good

United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."<sup>24</sup>

This prevents a suit by the assignee in his own name against the United States.<sup>25</sup>

An assignee for creditors may sue in the name of his assignor.<sup>26</sup> Before the Bowman Act it was held that when the suit was brought in the name of the assignor for the use of his assignee, the assignor must verify the petition, or the assignee must file a warrant of attorney or prove the assignment.<sup>27</sup> If the assignor died *pendente lite*, a verification by his executor was sufficient.<sup>28</sup> When the assignor and assignee joined as co-claimants, the assignor verifying the petition which alleged that the suit was for the assignee, there was no need of proving the assignment.<sup>29</sup> The assignor may repudiate a void assignment and sue in his own name.<sup>30</sup> If the legal title to real property has been divested out of the owner and vested in a trustee authorized to collect past and future rents, the trustee may sue.<sup>31</sup>

faith and for a valuable consideration, gave him no right to enjoin the acceptors from surrendering or the drawer from receiving the warrant after it had been issued to the acceptors. *Spofford v. Kirk*, 97 U. S. 484. No action will lie by an attorney against the head of a department for informing claimants that they were under no legal obligation to respect an assignment invalidated by the statute. *Spalding v. Vilas*, 161 U. S. 483. It seems that an injunction might be granted restraining the Secretary of the Treasury from paying a fund received by the United States from a foreign government for distribution when the United States makes no claim against the fund. *Ridgway v. Hays*, 5 Cranch, C. C. 23. But an injunction against the Secretary of the Treasury was denied to an attorney who claimed under an assignment of part of an award in favor of an Indian. *McElrath v. McIntosh*, 1 H. & H. 348. *Cf. Trist v. Child*, 21 Wall. 441.

<sup>24</sup> U. S. R. S., § 8737. See *Burck v. Taylor*, 152 U. S. 634, 647; *Wheeler's Case*, 5 Ct. Cl. 504; *Bailey v. U. S.*, 15 Ct. Cl. 490; *Dougherty v. U. S.*, 18 Ct. Cl. 496; *Francis' Case*, 11 Ct. Cl. 638; *Mills v. U. S.*, 19 Ct. Cl. 79; *McCord's Case*, 9 Ct. Cl. 155; *Mason's Case*, 14 Ct. Cl. 59; *Bowe v. U. S.*, 42 Fed. R. 761, 782; *Coates v. U. S.*, 58 Fed. R. 989, 991.

<sup>25</sup> *U. S. v. Gillis*, 95 U. S. 407; *s. c. sub nom. Gillis v. U. S.*, 12 Ct. Cl. 704. See also authorities cited *supra*, in note 23. Judge Deady held, in the Circuit Court for the District of Oregon, that an assignee may sue the United States in his own name in a District or Circuit Court. *Emmons v. U. S.*, 48 Fed. R. 48. *Contra, Forehand v. U. S.*, 23 Ct. Cl. 477, 482.

<sup>26</sup> *Morgan v. U. S.*, 14 Ct. Cl. 319.

<sup>27</sup> *Silverhill v. U. S.*, 5 Ct. Cl. 610; *Crowell v. U. S.*, 6 Ct. Cl. 23.

<sup>28</sup> *Pullen v. U. S.*, 7 Ct. Cl. 507.

<sup>29</sup> *Tebbetts v. U. S.*, 5 Ct. Cl. 607.

<sup>30</sup> *Belt v. U. S.*, 15 Ct. Cl. 92.

<sup>31</sup> *Mills v. U. S.*, 19 Ct. Cl. 79.

A claimant jointly interested must show the state of his interest.<sup>32</sup> The holder of a part interest in a claim to be paid when the warrant is issued, could not sue in the name of the legal holder of the claim.<sup>33</sup> It seems that separate interests cannot be united in one petition.<sup>34</sup> The disloyalty of one partner defeats any action by the other.<sup>35</sup> If the claim of a loyal contractor has been severed from that of his disloyal co-contractor, the former can sue.<sup>36</sup> The holder of a draft is not affected by the disloyalty of one who indorsed and delivered it before the civil war.<sup>37</sup> The provision requiring a denial of any transfer of the claim does not apply to a transfer of the property out of which the claim arose.<sup>38</sup>

Persons connected with the Confederacy are not required, after proclamation of pardon, to set forth their loyalty.<sup>39</sup> The petition of an alien, under an act founded upon a claim for losses resulting from the civil war, must show that he has not given voluntary aid to the Confederacy.<sup>40</sup> If a suit is brought for money illegally exacted, the petition must allege payment under protest,<sup>41</sup> or under circumstances that were equivalent to a protest, or made protest an idle form.<sup>42</sup> The case must be set out precisely and clearly.<sup>43</sup> The facts which authorize a recovery must be stated.<sup>44</sup> The petition and facts must so nearly correspond that the facts cannot introduce a demand not pleaded.<sup>45</sup> The evidence by which the facts are to be proven need not be pleaded.<sup>46</sup> If the claim is one ordinarily settled by

<sup>32</sup> *Headman v. U. S.*, 5 Ct. Cl. 640.

<sup>33</sup> *Raines v. U. S.*, 11 Ct. Cl. 648.

<sup>34</sup> *Wilson v. U. S.*, 1 Ct. Cl. 318; *Parish v. U. S.*, 1 Ct. Cl. 345; s. c., 8 Wall, 489.

<sup>35</sup> *Schreiner v. U. S.*, 6 Ct. Cl. 359.

<sup>36</sup> *U. S. v. Burns*, 12 Wall. 246; s. c. as *Burns v. U. S.*, 4 Ct. Cl. 113.

<sup>37</sup> *Peirce v. U. S.*, 1 Ct. Cl. 195.

<sup>38</sup> *Bates v. U. S.*, 4 Ct. Cl. 569.

<sup>39</sup> *Armstrong v. U. S.*, 13 Wall. 154; s. c., 6 Ct. Cl. 226; *Pargoud v. U. S.*, 13 Wall. 156; s. c., 4 Ct. Cl. 337, 349; *White v. U. S.*, 19 Ct. Cl. 436.

<sup>40</sup> *Hill v. U. S.*, 8 Ct. Cl. 470.

<sup>41</sup> *Schleisinger v. U. S.*, 1 Ct. Cl. 16; *Nicoll v. U. S.*, 1 Ct. Cl. 70; s. c. as *Nichols v. U. S.*, 7 Wall. 122; *U. S. v.*

*Kaufman*, 96 U. S. 567; *Campbell v. U. S.*, 107 U. S. 407; *U. S. v. Edmondston*, 181 U. S. 500.

<sup>42</sup> *Mosby v. U. S.*, 24 Ct. Cl. 1; s. c., 133 U. S. 278; *Stahel v. U. S.*, 26 Ct. Cl. 193; *Goldsbrough v. U. S.*, 25 Ct. Cl. 73; *U. S. v. Edmondston*, 181 U. S. 500.

<sup>43</sup> *Merchants' Exch. Co. v. U. S.*, 1 Ct. Cl. 332; *Guttman v. U. S.*, 6 Ct. Cl. 111; s. c. as *Stuart v. U. S.*, 18 Wall. 84.

<sup>44</sup> *Morgan v. U. S.*, 14 Ct. Cl. 442; *Monk v. U. S.*, 12 Ct. Cl. 293.

<sup>45</sup> *Baird v. U. S.*, 8 Ct. Cl. 13; s. c., 5 Ct. Cl. 348.

<sup>46</sup> *Noble v. U. S.*, Dev. 185.

a Department, it is the safer practice to recite the application for its adjustment.<sup>47</sup> The petition of an officer, since the Tucker Act of March 3, 1887, need not, ordinarily, allege that his claim for fees has been presented to the accounting officer.<sup>48</sup> If a Congressional Committee has transmitted to the court a bill for a claimant's relief, his petition should be confined to setting forth substantially the same cause of action.<sup>49</sup> If the claim rests upon a statute, it is the better practice to refer specifically to the statute.<sup>50</sup> A petition which is not verified may be corrected,<sup>51</sup> unless a special statute make a verification a jurisdictional necessity.<sup>52</sup>

**§ 445. Pleadings by defendant in Court of Claims.**—"Demurrers to petitions and general traverses thereof must be filed within two months after the filing of the petition; and pleas averring special defense, set-off, or counter-claim, within one month after the claimant places his case on the notice book."<sup>1</sup> "When the Attorney-General demurs to the petition, he must set forth the grounds of the demurrer specially; but if the ground be that the petition does not allege facts sufficient to constitute a cause of action, that objection may be stated generally. If the demurrer be sustained, the claimant may, once of right, amend his petition, within such time as the court may direct; but if he decline to amend, judgment will be rendered dismissing the petition. If the demurrer be overruled the defendants may, of right, plead to the petition, within such time as the court may direct; but if they decline so to plead, judgment will be rendered for the claimant according to the prayer of the petition; or the court will order an assessment of damages, as the Attorney-General may elect."<sup>2</sup> "Within one month after the filing of a set-off or counter-claim by the defendants, the claimant must answer the same by replication under oath; in default whereof the court may, after ten days' notice by the defendants to the claimant, order that the set-off or counter-claim be considered as admitted."<sup>3</sup>

<sup>47</sup> *Calkins v. U. S.*, 1 Ct. Cl. 382.

<sup>48</sup> *Ravesies v. U. S.*, 21 Ct. Cl. 243;  
*Bryan v. U. S.*, 21 Ct. Cl. 249.

<sup>49</sup> *Choteau v. U. S.*, 20 Ct. Cl. 250.

<sup>50</sup> *Noble v. U. S.*, Dev. 135.

<sup>51</sup> *Griffin v. U. S.*, 13 Ct. Cl. 257.

<sup>52</sup> *Cherokee Indians v. Cherokee Nations*, 19 Ct. Cl. 85.

§ 445. <sup>1</sup> Ct. Cl. Rule 15.

<sup>2</sup> Ct. Cl. Rule 16.

<sup>3</sup> Ct. Cl. Rule 17.



“When the Attorney-General pleads, under section 1086 of the Revised Statutes, that the claimant has practiced or attempted to practice fraud, he shall set forth the facts with sufficient particularity to enable the claimant to answer the same in detail; and the claimant shall, within two months after the filing of said plea, reply to the same with like particularity under oath.”<sup>4</sup> “Averments in regard to the time when a claim first accrued, or in regard to an alleged disability of the claimant, will be held to be put in issue by the defendant’s general traverse.”<sup>5</sup> “The court will take notice that a claim is barred by the Statute of Limitations, when that appears, although the defense is not raised by the defendant’s pleadings.”<sup>6</sup>

The defendant may demur at any time before pleading to the merits; and a plea in bar may, by leave of the court, be withdrawn and a demurrer filed.<sup>7</sup> It has been held that the United States waives a verification by filing a general traverse to an unverified petition.<sup>8</sup> A traverse puts upon the petitioner the burden of proving all material allegations.<sup>9</sup> Matters in the petition, not denied in the traverse, are presumed to be true.<sup>10</sup> Special rules of pleading do not bind the Court of Claims, but are usually followed, although the pleadings are construed liberally.<sup>11</sup> An objection to the right of the petitioner’s action should be raised by demurrer or plea.<sup>12</sup> It has been held that if the objection is to the jurisdiction only, it should be by plea.<sup>13</sup> A plea was held bad for duplicity when it set up a recovery in a previous action, and objected that the cause of action now sued upon accrued prior to the trial of such action, and might have been tried therein.<sup>14</sup> The United States may obtain leave after issue has been joined to plead specially to the allegations of loyalty.<sup>15</sup>

<sup>4</sup> Ct. Cl. Rule 18.

<sup>5</sup> Ct. Cl. Rule 73.

<sup>6</sup> *Finn v. U. S.*, 123 U. S. 227.

<sup>7</sup> *Matthew’s Case*, 35 Ct. Cl. 595.

<sup>8</sup> *Griffin v. U. S.*, 18 Ct. Cl. 257. A general traverse admits the competency of a claimant corporation to sue in its corporate capacity. *Southern Pacific Co.’s Case*, 28 Ct. Cl. 77.

<sup>9</sup> *Calkins v. U. S.*, 1 Ct. Cl. 382.

<sup>10</sup> *Hill v. U. S.*, 8 Ct. Cl. 470; *U. S.*

*v. Insurance Cos.*, 22 Wall. 99; s. c. as *Home Ins. Co. v. U. S.*, 8 Ct. Cl. 449.

<sup>11</sup> *Little v. Dist. of Col.*, 19 Ct. Cl. 323.

<sup>12</sup> *Pennsylvania Co. v. U. S.*, 7 Ct. Cl. 401.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Shrewsbury v. U. S.*, 9 Ct. Cl. 263.

<sup>15</sup> *Pierce v. U. S.*, 1 Ct. Cl. 195.

§ 446. **Amendments in Court of Claims.**— The plaintiff has the right to amend his petition once of right, within such time as the court directs when a demurrer to his petition is sustained.<sup>1</sup>

Amendments of errors which have not misled the other party and which may be corrected without injustice, are usually allowed.<sup>2</sup> Leave of the court is necessary for an amendment.<sup>3</sup> When a case is remanded for further proof, and the order specifies the amendment allowed, further leave need not be granted.<sup>4</sup> A petition which is not verified may be corrected by amendment<sup>5</sup> unless a special statute makes verification jurisdictional.<sup>6</sup> An amendment showing that the suit is brought in a representative capacity, and that a decedent owned the property claimed, may be allowed.<sup>7</sup> A petition by joint owners may be so amended as to ask for separate judgments.<sup>8</sup> Suits may be consolidated.<sup>9</sup> A change of parties claimant may be allowed by amendment, when no new cause of action is introduced, and the effect is to substitute one representative for another.<sup>10</sup>

§ 446. <sup>1</sup> Ct. Cl. Rule 16.

<sup>2</sup> Thomas v. U. S., 15 Ct. Cl. 385; Jones v. U. S., 1 Ct. Cl. 883.

<sup>3</sup> Shaw v. U. S., 9 Ct. Cl. 301. For the practice, see Ct. Cl. Rule 18, *supra*, § 444.

<sup>4</sup> Shaw v. U. S., 9 Ct. Cl. 301.

<sup>5</sup> Griffin v. U. S., 18 Ct. Cl. 257.

<sup>6</sup> Cherokee Indians v. Cherokee Nation, 19 Ct. Cl. 35.

<sup>7</sup> Thomas v. U. S., 15 Ct. Cl. 385.

<sup>8</sup> Mott v. U. S., 8 Ct. Cl. 218; Eager v. U. S., 33 Ct. Cl. 836, 837, per Mott, C. J.: "It has been a common and convenient practice in this court, where there are two suits between the same parties growing out of the same contract or cause of action, to consolidate them, to the end that the evidence in the first need not be duplicated in the second, and that both may be disposed of by one trial and argument. Conversely, under all conditions, parties have been allowed to bring in subsequently accruing demands by amendments. In such cases it is manifestly immaterial whether the second cause of ac-

tion be brought in by a second suit, and the two suits be then consolidated, or whether it be brought in by directly making it a count in the original suit. The difference will be only one of form. But this practice extends properly only to cases where the cause of action is substantially the same in both suits, as for instalments successively becoming due on the same contract, or rents for different periods on the same lease. In such cases an adjudication in the first suit would be operative as *res adjudicata* or by way of estoppel in the second; that is to say, if the contract or lease has been established in the first suit, all that the plaintiff will have to show in the second will be that another instalment has become due; and, conversely, if the contract or lease has been declared void in the former suit, the defendants, in the latter one, can use the adjudication by way of estoppel."

<sup>9</sup> Bellocque v. U. S., 8 Ct. Cl. 498.

<sup>10</sup> Cote v. U. S., 8 Ct. Cl. 64.

The assignor may be substituted for the assignee by amendment.<sup>11</sup> The vendee of the assignee may be substituted, although the claimant had assigned to another prior to his bankruptcy.<sup>12</sup> It has been held that a new party cannot be substituted by amendment when not in privity with the original ones.<sup>13</sup> The successor of one corporation to the franchises and property of another which had brought a suit in the Court of Claims was not allowed a substitution.<sup>14</sup> Unnecessary parties may be stricken out by amendment.<sup>15</sup> A person who at the time when the suit was commenced was under a disability, may be made a party by amendment.<sup>16</sup> When a claim has been referred by Congress, a party who claims as assignee cannot intervene unless the act making the reference permits his intervention.<sup>17</sup> A partner cannot intervene when the firm claims the same property.<sup>18</sup> If services rendered under the contract sued upon subsequently to the commencement of suit are brought into the case by consent, the whole matter will be disposed of as if a single cause of action.<sup>19</sup> An amendment may be allowed to the petition more than six years after the Statute of Limitations began to run.<sup>20</sup>

§ 447. Attorneys in Court of Claims.—“Suits may be commenced by the claimant in person, or through his attorney in fact, or an attorney of this court. If the claimant is represented by an attorney in fact, the power must be filed with the clerk, and its execution must be proved or acknowledged before an officer authorized to take acknowledgments of deeds.”<sup>1</sup>

<sup>11</sup> *Burke v. U. S.*, 13 Ct. Cl. 231. See *U. S. v. Gillis*, 95 U. S. 407.

<sup>12</sup> *Ches. & O. R. Co. v. U. S.*, 19 Ct. Cl. 300. But an administrator or executor of a decedent may be substituted for his heirs, *Cowan Infants' Case*, 5 Ct. Cl. 106; *Woodruff and Bouchard's Case*, 7 Ct. Cl. 605; an administratrix for herself as widow, *Skelly v. U. S.*, 32 Ct. Cl. 227; *Thomas v. U. S.*, 15 Ct. Cl. 335. In a suit against the United States and a tribe of Indians, another tribe was substituted for the latter after the statute of limitations had expired. *Duran v. U. S.*, 31 Ct. Cl. 353.

<sup>13</sup> *Chesapeake & O. R. Co. v. U. S.*, 19 Ct. Cl. 300.

<sup>14</sup> *Ches. & O. R. Co. v. U. S.*, 19 Ct. Cl. 300.

<sup>15</sup> *Molina v. U. S.*, 6 Ct. Cl. 269; *Benton v. U. S.*, 5 Ct. Cl. 692; *Roddin v. U. S.*, 6 Ct. Cl. 308.

<sup>16</sup> *Stanton v. U. S.*, 4 Ct. Cl. 456.

<sup>17</sup> *Atocha v. U. S.*, 6 Ct. Cl. 69.

<sup>18</sup> *Bellocque v. U. S.*, 8 Ct. Cl. 493.

<sup>19</sup> *Cape Ann G. Co. v. U. S.*, 20 Ct. Cl. 1.

<sup>20</sup> *Griffin v. U. S.*, 13 Ct. Cl. 257. See also *Devlin v. U. S.*, 12 Ct. Cl. 266.

§ 447. <sup>1</sup> Ct. Cl. Rule 1.

“Any person of good moral character, who has been admitted to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of any State or Territory, may be admitted, on motion in open court, to practice as an attorney and counselor of this court. He may also be admitted by an order at chambers, on its being shown by affidavit or otherwise that he is qualified as above provided.”<sup>2</sup>

“There shall be but one attorney of record for the claimant in any case at any one time; but a claimant may be permitted to change his attorney, on such conditions as the court may prescribe. A firm of attorneys will be regarded as the attorney of record.”<sup>3</sup>

“Petitions, pleadings, and motions on the part of the claimant will be signed by the attorney of record; pleadings and motions on the part of the United States, by the Assistant Attorney-General.”<sup>4</sup>

“Attorneys of record, or the claimant, if he appear in person, will, on commencing or appearing in a suit, register with the clerk of the court a postoffice address, to which all notices required by these rules or ordered by the court may be addressed.”<sup>5</sup> “Counsel, other than the attorney of record, may be heard on either side at the trial or in any stage of the proceedings, but shall not be entitled to file pleadings, give notices, or make motions.”<sup>6</sup>

§ 448. Evidence before the Court of Claims.—The following statutes and rules regulate evidence before the Court of Claims:—

“The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same.”<sup>1</sup> “Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively

<sup>2</sup> Ct. CL Rule 2.

<sup>3</sup> Ct. CL Rule 3.

<sup>4</sup> Ct. CL Rule 4. Counsel can neither make motions in their own name nor in the name of the attorney

of record without his authority. In the Matter of Counsel, 32 Ct. CL 231.

<sup>5</sup> Ct. CL Rule 5.

<sup>6</sup> Ct. CL Rule 6.

§ 448. <sup>1</sup> U. S. R. S., § 1071.

that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.”<sup>2</sup> “The Court of Claims shall have power to appoint Commissioners to take testimony to be used in the investigation of claims which come before it; to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.”<sup>3</sup> “When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony therein.”<sup>4</sup>

“The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States, appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.”<sup>5</sup>

The right to investigate before the trial does not extend beyond the examination of the claimant. He is not responsible for the failure of one of his witnesses to attend; and the prosecution of the case can only be stayed in case of his refusal to

<sup>2</sup> U. S. R. S., § 1074.

<sup>3</sup> U. S. R. S., § 1075.

<sup>4</sup> U. S. R. S., § 1077.

<sup>5</sup> U. S. R. S., § 1080.

testify.<sup>6</sup> A corporate claimant may be required to produce its officers for examination before trial in the same manner as if a bill of discovery had been filed against it.<sup>7</sup>

“In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.”<sup>8</sup>

“The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witnesses brought before him for examination.”<sup>9</sup>

It has been held that *ex parte* affidavits filed with a committee of Congress, and transmitted with the claim, are inadmissible as evidence;<sup>10</sup> but that *ex parte* affidavits taken by the officers of the government required to make an investigation, and transmitted with the papers, may be received.<sup>11</sup> Vouchers, papers, proofs, and documents sent by the head of a department to the Court of Claims, under section 1063 of the Revised Statutes, are not necessarily evidence.<sup>12</sup> No person is now excluded as a witness in the Court of Claims because he is a party to or interested in the suit.<sup>13</sup>

“No witness shall be excluded in any suit in the Court of Claims on account of color.”<sup>14</sup>

“The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done.”<sup>15</sup>

“The court may order a witness or a claimant to be produced before the court or one of the judges thereof for examination.”<sup>16</sup>

“The Court of Claims may issue subpoenas to require the at-

<sup>6</sup> Macauley v. U. S., 11 Ct. CL 575; Atchison, T. & S. F. R. Co. v. U. S., 15 Ct. CL 1.

<sup>7</sup> Atchison, T. & S. F. R. Co. v. U. S., 15 Ct. CL 1.

<sup>8</sup> U. S. R. S., § 1083.

<sup>9</sup> U. S. R. S., § 1084.

<sup>10</sup> Smith v. U. S., 19 Ct. CL 690.

<sup>11</sup> Chickasaw Nation v. U. S., 19 Ct. CL 138.

<sup>12</sup> Brannen v. U. S., 20 Ct. CL 219.

<sup>13</sup> 24 St. at L., ch. 859, § 8, p. 506; U. S. v. Clark, 96 U. S. 37.

<sup>14</sup> U. S. R. S., § 1078.

<sup>15</sup> U. S. R. S., § 1081.

<sup>16</sup> Ct. CL Rule 29. As to the practice and punishment of disobedience by contempt, see Elting v. U. S., 27 Ct. CL 158.



tendance of witnesses in order to be examined before any person commissioned to take testimony therein, and such subpoenas shall have the same force as if issued from a District Court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.”<sup>17</sup>

“If a witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.”<sup>18</sup>

“The fees of witnesses shall be such as are now, or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.”<sup>19</sup>

Subpoenas and other writs of process of the Court of Claims may be served all over the United States.<sup>20</sup> The territorial jurisdiction of the Court of Claims is not confined to the District of Columbia.<sup>21</sup> A return by the head of a department stating that to furnish information or papers would in his opinion be injurious to the public interest, is a sufficient answer to the request of the Court of Claims for such information or papers.<sup>22</sup> It has been held that the Court of Claims has no power to call upon an executive department for evidence of acknowledgments or promises, so as to take a claim out of the Statute of Limitations.<sup>23</sup>

“When a petition is filed, either party may proceed to take testimony, notwithstanding that issue of fact has not been joined, or that issue on demurrer may be pending.”<sup>24</sup> “Unless the court order a witness to testify orally on the trial, the evidence of witnesses must be by deposition, taken either before a commissioner of the court, or a judge of a court of the United States, or a judge of a court of record in a State or Territory of the United States, or a commissioner appointed by a Circuit Court of the United States, or a notary public.”<sup>25</sup> “When a witness can be conveniently examined before a judge of this court,

<sup>17</sup> U. S. R. S., § 1082.

<sup>18</sup> Ct. Cl. Rule 27.

<sup>19</sup> Ct. Cl. Rule 28.

<sup>20</sup> *Jones v. U. S.*, 1 Ct. Cl. 383, 398;  
*Sykes v. U. S.*, 8 Ct. Cl. 330.

<sup>21</sup> *Ibid.*

<sup>22</sup> 13 A. G. Op. 530.

<sup>23</sup> *Leonard v. U. S.*, 18 Ct. Cl. 382.

<sup>24</sup> Ct. Cl. Rule 24.

<sup>25</sup> Ct. Cl. Rule 25.

either party at any time prior to the examination may move for an order directing that his deposition be so taken.”<sup>26</sup>

“Depositions obtained in foreign countries must be taken on written interrogatories, sent out under a special commission issued by the clerk. Depositions may be taken in like manner within the United States, by consent of parties, or when authorized by the court, or by a judge in vacation. The written interrogatories must be filed in the clerk’s office, and notice thereof given to the adverse party. Within fifteen days after such notice, the adverse party may file objections to any of the interrogatories, specifically stating the grounds of objection; and may either file cross-interrogatories, or a notice that he will cross-examine the witnesses orally, which notice shall be attached to and sent out with the special commission. If he file cross-interrogatories, the other party may, within fifteen days thereafter, file objections thereto, specifically stating the grounds of objection. No objections to an interrogatory or a cross-interrogatory will be considered at the trial unless taken before the commission issues.”<sup>27</sup> “When a deposition is taken upon written interrogatories and written cross-interrogatories, neither the Attorney-General, nor the claimant, his agent or attorney, nor any other person, shall be present at the examination of the witness; which fact shall be certified by the officer taking the deposition; who shall, in such cases, propound the interrogatories and cross-interrogatories to the witness in their order, and reduce his answer to writing as nearly as practicable in his precise words.”<sup>28</sup>

“The party proposing to take depositions on oral examination shall cause fifteen days’ notice to be given thereof to the other party. The notice must be in writing, and state the names of the witnesses to be examined, the day of the month, the hour, and the place of taking the deposition. But no deposition, except by consent of parties or the order of court, shall be taken during a day when the attorney of record for the claimant, or the attorney of the Department of Justice charged with preparation of the case or cases in which the deposition is to be used, is so engaged in the trial of cases in court that he cannot attend. When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from

<sup>26</sup> Ct. Cl. Rule 26.

<sup>27</sup> Ct. Cl. Rule 30.

<sup>28</sup> Ct. Cl. Rule 31.

Washington, or when the defendants propose to take the deposition, and the witness resides more than five hundred miles from the claimant or his attorney, one day's further notice shall be given for every additional hundred miles."<sup>29</sup> "If the claimant proposes to take a deposition in the city of Washington, three days' notice shall be sufficient; and a like notice by the defendants shall be sufficient when the claimant's attorney resides in the city of Washington."<sup>30</sup> "When a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down, as nearly as may be, in his own words, except so far as this may be expressly waived by consent of both parties."<sup>31</sup>

"No general objection to any question shall be noticed by the officer; but where an objection is made on specifically stated grounds, the officer shall record the same."<sup>32</sup> Objections to form or on the ground that the evidence is not the best evidence should be taken at the deposition or before the trial.<sup>33</sup> Objections to relevancy may be taken in the trial.<sup>34</sup> "When depositions are taken on notice, as provided in Rule 32, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses; but in such case one day's notice must be given to the adverse party, or his attorney, there present."<sup>35</sup>

"Witnesses must be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, age, occupation, and place of residence; whether he has any, and, if any, what interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he does, he shall state it. The testimony of the witness when completed shall be read over to

<sup>29</sup> Ct. Cl. Rule 32.

<sup>30</sup> Ct. Cl. Rule 33.

<sup>31</sup> Ct. Cl. Rule 34.

<sup>32</sup> Ct. Cl. Rule 35.

<sup>33</sup> Hughes v. U. S., 4 Ct. Cl. 64.

<sup>34</sup> Ibid.

<sup>35</sup> Ct. Cl. Rule 36.

him, and be signed by him in the presence of the officer.”<sup>36</sup> “The officer should so connect the sheets of the deposition that they cannot be tampered with, and should return them sealed together. He should sign, and make the witness sign, each sheet; and generally he should spare no pains to return to the court the exact evidence he has taken. All exhibits should be carefully marked so as to be capable of immediate identification, and, when practicable, should be attached to the deposition under seal.”<sup>37</sup> “The officer must state, in the caption of the deposition, the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition must also be shown by whom the witness was examined and cross-examined.”<sup>38</sup> “In his return the officer must show that the witness was properly sworn or affirmed, and that the answers were taken down in his presence, and read over to and signed by the witness.”<sup>39</sup> “The officer must enclose the commission, depositions, and exhibits in a packet, under his seal, and direct the same to the clerk of the court at Washington, and deposit the package in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet.”<sup>40</sup> “If the officer’s fees be not paid at the time of taking the deposition, he should indorse on the outside of the packet the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof. The packet must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon. The clerk will then open the packet, and tax the officer’s charges at the rates hereinafter provided, and will immediately transmit to him the amount taxed, returning the overplus, if any, to the party. The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor.”<sup>41</sup>

<sup>36</sup> Ct. Cl. Rule 37.

<sup>37</sup> Ct. Cl. Rule 38.

<sup>38</sup> Ct. Cl. Rule 39.

<sup>39</sup> Ct. Cl. Rule 40.

<sup>40</sup> Ct. Cl. Rule 41.

<sup>41</sup> Ct. Cl. Rule 42. “The fees shall be three dollars a day for attending

to take the depositions, and fifteen cents a folio of one hundred words for taking and returning it; but this *per diem* allowance is limited to one day for a deposition or series of depositions taken in the same case. Shorthand reporters, acting as special

“Objections to the notice, or the form and manner of taking or returning the testimony, must be made in writing, and filed within one month after notice of the filing of the deposition, or they will be considered as waived.”<sup>42</sup>

“The Attorney-General may offer in evidence properly certified information and papers from any executive department, without calling for the same under the provisions of section 1076 of the Revised Statutes. A call for such information and papers will be made at claimant's request, on the approval of a judge in chambers. On the receipt of an answer to the call, the clerk will notify the claimant's counsel and the Attorney-General by post.”<sup>43</sup> “All information or papers furnished by an executive department in response to a call, or through the Attorney-General, is subject to objection by either party according to the rules of evidence at the common law; but neither party will be required to produce the originals of such papers, or to prove their execution, unless within one month after the return is filed the party objecting to such papers enter of record in the clerk's office a written denial of their genuineness. Such information and papers in reply to a claimant's call, not objected to by him within ten days after return of the call, will be regarded as evidence offered by claimant.”<sup>44</sup>

“Whenever it is charged in a petition that a contract has been made or other liability incurred through an officer or agent of the United States, other than the head of an executive department or the chief of a bureau, the claimant will be required to prove that such person was an officer or agent of the United States, by the certificate of the proper executive department, or by other legal and sufficient evidence.”<sup>45</sup> “Any information or papers certified from any executive department, and filed in any cause, may be used and applied in any other pending cause to which the same may be applicable or perti-

commissioners, will receive, in addition to these fees, ten cents a folio for writing out the deposition from their notes.” Ct. Cl. Rule 43. “Any permanent commissioner charging in excess of the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal con-

duct, and his commission will be revoked.” Ct. Cl. Rule 44.

<sup>42</sup> Ct. Cl. Rule 45.

<sup>43</sup> Ct. Cl. Rule 46. As to what documentary evidence is admitted, see *The Ship Parkman*, 35 Ct. Cl. 406, 409; *Block v. U. S.*, 7 Ct. Cl. 406.

<sup>44</sup> Ct. Cl. Rule 47.

<sup>45</sup> Ct. Cl. Rule 48.

ment. To entitle such information or papers to be used, copies thereof must be filed in such other cause before the same shall have been placed on the trial docket.”<sup>46</sup> “The court may, at the instance of the Attorney-General, order any claimant, his agent or attorney, to produce in court, or before any officer authorized to take depositions, any letters, papers, deeds, documents, or other writings in his possession or subject to his control, in any way relating to the claim sued upon; and any claimant, his agent or attorney, who, after due notice, refuses to produce such letters, papers, deeds, documents, or other writings, when in his power to do so, shall be subject to attachment for contempt; and, if he persists in such refusal, the court will direct the petition to be dismissed.”<sup>47</sup>

“The testimony and briefs will be printed. In printing the testimony, the notices and the officers’ captions and certificates will be omitted; but to each deposition there must be prefixed a title in the following form: Deposition of ———, for claimant (or defendants, as the case may be), taken at ———, on the ——— day of ———, 19—; claimant’s counsel, ———; defendant’s counsel, ———.”<sup>48</sup> “Where an answer of a department is printed as evidence the call for the same must be printed therewith.”<sup>49</sup> “Before printing a return made to a call on a department, the chief clerk will withhold from the copy for the printer — 1st. All papers of which copies have been previously printed in the record of the case; and for this purpose he will compare the two copies, and if variations are found he will take the directions of a judge in chambers before sending the return to the printer. 2nd. All certificates of authenticity and certificates of acknowledgments. 3rd. All papers which a judge in chambers orders to be omitted. In each case the chief clerk will make a memorandum of the omission in the copy for the printer, verified by his initials.”<sup>50</sup>

“If the claimant objects to printing information or papers so returned, and the Attorney-General request to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached; and when such information or papers are printed, the same will be re-

<sup>46</sup> Ct. CL Rule 49.

<sup>47</sup> Ct. CL Rule 50.

<sup>48</sup> Ct. CL Rule 63.

<sup>49</sup> Ct. CL Rule 64.

<sup>50</sup> Ct. CL Rule 65.



garded as evidence offered on the part of the defense.”<sup>51</sup> “The printed papers required by these rules must be in long primer type and in royal octavo pages, and the style and number of the case must be prefixed to all printed papers and to records of evidence.”<sup>52</sup> “No deposition, return, or record on file shall be taken from the custody of the clerk by a claimant or his attorney, but either may attend at the clerk’s office, and prepare his evidence for the press in the form and manner before prescribed. When the evidence is complete and ready for the printer, the chief clerk will have it printed at the Public Printing Office.”<sup>53</sup> “The deposition of a claimant, taken under section 1080 of the Revised Statutes, shall not be printed, unless the Attorney-General shall first have filed in the case a written declaration of his intention to read the same in evidence on the trial; and the filing of such declaration shall be considered as the exercise of the discretion vested in that officer by said section, and shall entitle the claimant to read the examination as evidence at the trial, if the Attorney-General declines to do so, unless for good cause shown the court shall otherwise order.”<sup>54</sup> “In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late war for the suppression of the rebellion, no testimony shall, without authority of a judge of the court or the consent of both parties, be taken in regard to the merits of the claim until after the preliminary inquiry in regard to the claimant’s loyalty shall have been decided in his favor.”<sup>55</sup>

“If a claim which was at any time before the Commissioners of Claims, appointed under the act of March 3, 1871, be transmitted to this court by either House of Congress, or by any committee thereof, under said act, and with such claim there be transmitted depositions, which were duly taken in conformity with the rules of said commission, such depositions may be used by either party as evidence at the preliminary inquiry aforesaid, or at the final hearing of the cause, or at both, subject to such objections to their competency or relevancy as might be made if the deponents were examined in

<sup>51</sup> Ct. Cl. Rule 66.

<sup>52</sup> Ct. Cl. Rule 67.

<sup>53</sup> Ct. Cl. Rule 68.

<sup>54</sup> Ct. Cl. Rule 69.

<sup>55</sup> Ct. Cl. Rule 99.

open court, or their depositions were regularly taken under the rules of this court.”<sup>56</sup> “If it be made to appear that, besides the depositions so transmitted, there are among the papers of said commission other such depositions relating to the claimant’s loyalty, or to the merits of his claim, a judge of the court may authorize such depositions, or duly certified copies thereof, to be obtained and filed in the clerk’s office of this court, to be used as evidence in the same manner and on the same terms as if they had been transmitted with the claim.”<sup>57</sup> “To entitle either party to use as evidence any deposition under either of the next two preceding sections, there must be given to the other party at least two months’ notice of the intention so to use it.”<sup>58</sup> “No such deposition shall be printed unless authorized by a judge of the court.”<sup>59</sup>

“Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion, shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion and to the persons engaged therein.”<sup>60</sup>

§ 449. **Motions and notices in Court of Claims.**—“Motions will be heard in the first instance before a judge at chambers; but he may direct the same to be heard in open court. They must come to him through the clerk’s office, and when acted upon, will be returned there by him.”<sup>1</sup> “Motions must

<sup>56</sup> Ct. Cl. Rule 101.

<sup>57</sup> Ct. Cl. Rule 102.

<sup>58</sup> Ct. Cl. Rule 103.

<sup>59</sup> Ct. Cl. Rule 104.

<sup>60</sup> U. S. R. S., § 1074. After the taking of testimony is closed and the case placed on the calendar, neither party can take new testimony without an order of the court upon an application, when the new facts

sought to be proved must be stated with sufficient particularity to enable the opposing party to answer them; and the withdrawal of a case that has been submitted and its remand to the calendar will not authorize the taking further evidence without such special leave. Giddings’ Case, 29 Ct. Cl. 12.

§ 449. <sup>1</sup> Ct. Cl. Rule 19.

be in writing, signed by the attorney of record, and must give the title and number of the case and the term at which they are made; and in no case shall the clerk enter the motion unless this rule shall be complied with. Any brief filed in connection with a motion must be printed or type-written.”<sup>2</sup>

“No order will be entered by the clerk unless it be directed from the bench, or be reduced to writing and marked ‘Allowed’ by the Chief Justice or one of the judges.”<sup>3</sup>

“The clerk will not file any paper unless it be properly indorsed with the title and number of the suit and the name of the attorney filing it.”<sup>4</sup>

“Parties filing petitions, pleadings, and motions, except motions for calls on Departments, must at the same time leave with the clerk written notice thereof, addressed to the attorney of the adverse party, with postage prepaid, and the clerk will mail the same and note the fact on the general docket. All other notices to adverse parties may be served in like manner. The clerk’s entry on his docket will be *prima facie* evidence of the service. In the computation of time the day of service will be excluded, and the day on which a party is required to appear, or on which an act is required to be done, will be included.”<sup>5</sup>

§ 450. **Abatement and revivor.**—“If the claimant die pending the suit, his death may be suggested on the record, and his proper representative may, on motion, and on filing a duly authenticated copy of the record of his appointment as executor or administrator, be admitted to prosecute the suit.”<sup>1</sup>

“On the death of a sole claimant, if his executor or administrator does not come in and prosecute the action, as provided in Rule 14, on or before the first ten days of the next term after the suggestion is made, the case may be dismissed, provided the Attorney-General shall have served notice upon the attorney of record in the case three months at least before the commencement of such term.”<sup>2</sup> Where there is a dispute as to the proper party to revive, the proceedings may be stayed till the determination of the State court of probate.<sup>3</sup>

<sup>2</sup> Ct. Cl. Rule 20.

<sup>3</sup> Ct. Cl. Rule 21.

<sup>4</sup> Ct. Cl. Rule 22.

<sup>5</sup> Ct. Cl. Rule 23.

§ 450. <sup>1</sup> Ct. Cl. Rule 14.

<sup>2</sup> Ct. Cl. Rule 75. See *Atlantic Constr. Co.’s Case*, 35 Ct. Cl. 80.

<sup>3</sup> *Cosgrove, Adm’r, v. U. S.*, 33 Ct. Cl. 167.

§ 451. **Discontinuance and withdrawal of papers.**—“Where fraud or set-off is pleaded, the claimant shall not, without leave of the court, discontinue his suit. In other cases he may do so, either in open court, or with the approval of a judge in vacation.”<sup>1</sup> “Papers shall not be withdrawn from the files except on motion for good cause shown, and upon such terms as the court or a judge may order.”<sup>2</sup> A claimant cannot dismiss his own suit without the consent of his attorney or the permission of the court.<sup>3</sup> When two suits have been brought upon the same claim, that first brought must first be tried, unless it is discontinued by permission of the court.<sup>4</sup>

§ 452. **Trials in Court of Claims.**—“The claimant may at any time give notice to the Attorney-General that his proof is closed on the merits, by an entry to that effect in the notice book in the clerk’s office. If the Attorney-General shall not within two months thereafter file a request for further time to take proof, the claimant may, at any time after the expiration of that period, have the case placed on the trial list, provided he has filed requests for findings and brief.”<sup>1</sup>

“The clerk shall not place a case on the trial list until the claimant files in the clerk’s office twenty-five printed copies of a brief stating the points of law on which he relies, with reference to authorities, and twenty-five printed copies of the request for facts required by Rule V of the ‘Regulations prescribed by the Supreme Court of the United States under which appeals may be taken from the Court of Claims.’”<sup>2</sup> “Such request must be in the following terms: ‘*The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows.*’ Following this request must be a statement, in the form of distinct numbered propositions, of the facts which the party desires to have found; and each proposition must be so prepared with respect to its length, subject, and phraseology, that the court may conveniently pass upon it; and they must be so arranged as to present a concise statement, in orderly and logical sequence, of the whole case, as the party desires it to ap-

§ 451. <sup>1</sup> Ct. Cl. Rule 74.

<sup>2</sup> Ct. Cl. Rule 90.

<sup>3</sup> Redfield’s Case, 27 Ct. Cl. 478.

<sup>4</sup> Ibid.

<sup>1</sup> § 452. Ct. Cl. Rule 51.

<sup>2</sup> Ct. Cl. Rule 52.

pear in the findings of fact. Subjoined to each proposition must be references to the pages of the record or to the unprinted evidence relied on in its support; but no evidence must be set out. Documents which may enter into the findings of fact need not be presented in the statement, but may be referred to therein by the pages of the record.”<sup>3</sup> “The Attorney-General, within one month after the filing of the claimant’s brief and request, must file his brief and request for findings of fact, and should indicate the requests on the claimant’s part to which no objection is made. Such request must be in form and substance like that required of the claimant by the next preceding section.”<sup>4</sup> “The attorney of each party shall append to his brief a table of each deposition, letter, document, or other paper which he may offer in evidence on the trial, with references to the pages of the record, if they be there, and if they be not of the printed record, then to the places where they may be found.”<sup>5</sup>

“If the claimant neglect, for two years after filing his petition, to close his proof and give notice to the Attorney-General, as required by Rule 51, the defendants may place the case on the trial list.”<sup>6</sup>

“Whenever, in any case which the claimant has not put on the trial list, it shall be shown to the court that an early decision thereof is important to the interests of the Government, the case may, in the discretion of the court, be placed on the trial list by the defendants.”<sup>7</sup>

“When the defendant’s brief and request are filed the case will be considered as ready for trial, and, when reached, a continuance will not be ordered, except by consent of parties or for good cause shown.”<sup>8</sup>

“The trial docket will be made up monthly. Cases will go upon it in the order in which notices of trial have been filed.”<sup>9</sup>

“The peremptory call of the trial docket will begin on the Tuesday after the first Monday of each month during the term.”<sup>10</sup> “No case will be heard for trial unless the printed pleadings, evidence, and briefs be made up in book form to-

<sup>3</sup> Ct. Cl. Rule 53.

<sup>4</sup> Ct. Cl. Rule 54.

<sup>5</sup> Ct. Cl. Rule 55.

<sup>6</sup> Ct. Cl. Rule 56.

<sup>7</sup> Ct. Cl. Rule 57.

<sup>8</sup> Ct. Cl. Rule 58.

<sup>9</sup> Ct. Cl. Rule 59.

<sup>10</sup> Ct. Cl. Rule 60.

gether and paged consecutively, and a copy thereof furnished to each member of the court at the hearing; and all citations from, or references to, such pleadings, evidence, and briefs must be by the consecutive paging of such book.”<sup>11</sup>

“The law docket will be taken up on Monday of each week during the term.”<sup>12</sup>

“Cases for decision on preliminary question of loyalty may be submitted without being put on the trial docket as prescribed by Rule 51. But each party must file one type-written copy of a brief referring to the evidence relied upon, or giving a full abstract of the same, and must comply with Rule 98.”<sup>13</sup>

<sup>11</sup> Ct. Cl. Rule 61.

<sup>12</sup> Ct. Cl. Rule 62.

<sup>13</sup> Ct. Cl. Rule 100.

The following rule relates to the trial of French spoliation claims:

“Before the defendants shall be required to place any case on trial, the claimants on account of the vessel, cargo, or insurance, or some one or more of them concerned in the same seizure, shall furnish to the Attorney-General a printed statement of alleged facts under the heads hereinafter set out. At the time of trial one copy shall be furnished to each of the judges. Documents not printed in the record must be numbered, put in envelopes (as far as practicable), and noted on the outside thereof. Under each head reference must be made to the pages of the printed record, and to unprinted and separate documents by number of envelope and number of paper therein, or other convenient designation, relied upon in support of allegations. No case can be submitted until these requirements are complied with.

#### FORM OF STATEMENT.

##### *Title of Case.*

##### 1. Name of vessel and master.

Docket number of each case with names of claimants, and, where there are intervenors,

their names to be set out under the case in which they intervene, with the number of any separate petition by them; to be made up after the manner of the case of the schooner ‘Phoenix,’ reported to Congress, thus:

Schooner ‘Phoenix,’ Solomon Babson, master.

129. Thomas Cushing, administrator of Marston Watson, claimant.

8162. Charles T. Lovering, administrator of Joseph Taylor, claimant.

James C. Davis, administrator of Cornelius Durant, claimant.

260. Charles F. Adams, administrator of Peter C. Brooks, claimant.

William Sohler, administrator of Nathaniel Fellowes, claimant.

(4264.) Francis M. Boutwell, administrator of Benjamin Cobb, claimant.

(4257.) Charles F. Hunt, administrator of Joseph Russell, surviving partner of Jeffrey and Russell, claimant.

Frederick O. Prince, administrator of James Prince, claimant.

Thomas H. Perkins, administrator of John C. Jones, claimant.



**§ 453. References by Court of Claims.**—The Court of Claims cannot delegate its powers, but may refer cases involving complicated accounts and facts to a special commissioner to state the accounts, marshal the assets, and adjust the losses.<sup>1</sup> Where several persons seek to recover the proceeds of property from a common fund, a reference is proper.<sup>2</sup> If the claimant's neglect to furnish items makes a reference necessary, he must bear the expense.<sup>3</sup> Notice of a reference must be given to all parties thereto.<sup>4</sup> Exceptions should be taken if a party is not satisfied with the commissioner's findings.<sup>5</sup>

#### *Vessel.*

2. Names of owners, and their respective shares.

3. When and where built.

4. Register.

5. Dates of sailing and points of departure and destination.

6. Seizure and condemnation.

7. Facts relied upon as showing illegality of condemnation.

8. Insurance on vessel or freight, naming all the underwriters and amount admitted to have been paid to each owner on account of loss, and from whom received. Refer to policies and other evidence.

#### *Cargo.*

9. Owners of cargo, stating each separately, and whether the interest be in whole or divided, with number of case in which they appear.

10. Value of cargo and of each claimant's interest therein.

11. Insurance of cargo, naming all the underwriters and amount admitted to have been paid to each owner on account of loss, and from whom received. Refer to policies and other evidence.

#### *Vessel, Cargo, and Insurance.*

12. Assignments.

13. When there are adverse claimants, the facts alleged by each claimant to be specified.

14. In case of intervention, the date of filing of motion, and case in

which filed, to be stated with reference to envelope in which same are to be placed.

15. Evidence of citizenship of claimants and identity must be referred to under their respective names.

16. Time of death of partners when administrator sues as representative of survivor.

17. Administrators, receivers, and assignees, when and where appointed and evidence of appointments.

18. When facts relied upon as found in other cases, such cases must be specially referred to.

#### *Recapitulation and Summary.*

Name of each claimant, stating number of petition, and where printed or found, and when an intervenor, the date of intervention and where motion is found, and setting forth exactly in items what is claimed by him in all, as owner of vessel or cargo, or as insurer, stated separately and with references as aforesaid, so that the court may readily find all the evidence necessary to state each claimant's case distinctly." Ct. Cl. Rule 106.

§ 453. <sup>1</sup> Intermingled Cotton Cases, 92 U. S. 651.

<sup>2</sup> Persons v. U. S., 10 Ct. Cl. 502; Crowell v. U. S., 6 Ct. Cl. 23.

<sup>3</sup> Jones v. U. S., 4 Ct. Cl. 197.

<sup>4</sup> Ibid.

<sup>5</sup> Bright v. U. S., 12 Ct. Cl. 646.

§ 454. **New trials.**—“When a judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery, in suits between individuals, would furnish sufficient ground for granting a new trial.”<sup>1</sup>

“The Court of Claims at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.”<sup>2</sup>

“A new trial will not be granted where, upon the whole case, justice has been done between the parties and the judgment is substantially right, although there may have been some mistakes committed at the trial. In cases transmitted to the court by Congress, or a committee thereof, or by the head of a Department, under the acts of March 3, 1883, ch. 116, and March 3, 1887, ch. 359; and in cases under the French Spoliation Act of January 20, 1885, ch. 25, new trials will not be granted on motion of claimant after the findings have been reported as required by law. But new trials may be granted, on motion of defendants, for the causes and within the time specified in section 1088 of the Revised Statutes.”<sup>3</sup>

“A motion by a claimant for a new trial may be founded upon one or more of the following grounds: 1. Error of fact; 2. Error of law; and 3. Newly discovered evidence. It must be made at the term in which the judgment is rendered, and before the commencement of the long vacation. In case of judgment entered within thirty days before the summer adjournment, then such motion may be made before the end of the vacation.”<sup>4</sup> “A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is re-

§ 454. <sup>1</sup> U. S. R. S., § 1087.

<sup>2</sup> U. S. R. S., § 1088.

<sup>3</sup> Ct. Cl. Rule 76.

<sup>4</sup> Ct. Cl. Rule 77.

lied on to support the motion.”<sup>5</sup> “A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.”<sup>6</sup> “A motion upon the ground of newly-discovered evidence will not be entertained unless it appear that the newly-discovered evidence came to the knowledge of the claimant or his attorney after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted; and that it is not cumulative. Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth —

“1st. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence. 2d. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts. 3d. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel, until after the close of the trial. 4th. The reasons why the claimant and his attorney of record and his said counsel could not have discovered said evidence before the trial, if due diligence had been used.”<sup>7</sup>

“If the court desires to hear argument upon a motion by a claimant for a new trial, the motion will be ordered to the law docket; otherwise, decision will be announced from the bench without hearing.”<sup>8</sup>

A misunderstanding as to a supposed agreement to have a case abide the result of an appeal from another judgment is a ground for granting a new trial.<sup>9</sup>

It has been held that a delay of three years is a sufficient reason for denying a motion for a new trial.<sup>10</sup> The court may grant a new trial after an appeal, provided the record has been returned.<sup>11</sup> The fact that the amount involved in a cause pre-

<sup>5</sup> Ct. CL Rule 78.

<sup>6</sup> Ct. CL Rule 79.

<sup>7</sup> Ct. CL Rule 80.

<sup>8</sup> Ct. CL Rule 81.

<sup>9</sup> *Belknap v. U. S.*, 150 U. S. 588.

<sup>10</sup> *Figh v. U. S.*, 3 Ct. CL 97.

<sup>11</sup> *Roberts v. U. S.*, 92 U. S. 41;  
*Belknap v. U. S.*, 150 U. S. 588.

cludes an appeal is no reason for a new trial.<sup>12</sup> A new trial will not be granted because a party failed to communicate to his attorney essential evidence;<sup>13</sup> nor, if new evidence could have been discovered with due diligence before the first trial;<sup>14</sup> nor because the claimant was insane at the first trial, and has since been restored to health, in the absence of other sufficient reasons;<sup>15</sup> nor for new evidence which is merely cumulative;<sup>16</sup> nor if the new evidence is merely such as impeaches the character or credit of the witness;<sup>17</sup> nor for an omission of the court to find a fact, which, if found, would not control the case.<sup>18</sup> Motions analogous to motions to set aside a verdict because contrary to the weight of evidence, will not be allowed as a matter of right.<sup>19</sup> A rehearing on a point presented and considered in the argument and disposition of the case, will not be granted unless desired by one of the judges who rendered judgment.<sup>20</sup>

If it appears that newly discovered evidence may change the basis of the judgment and entitle the party to a review on the law, a new trial may be granted;<sup>21</sup> or if a motion because of newly discovered evidence appeals to the court's sense of justice, and shows the existence of strong *prima facie* reasons for doubting the correctness of a finding, a rehearing will be granted on that point,<sup>22</sup> and the findings may be amended for the better information of the Supreme Court without changing the result below.<sup>23</sup> When the claimant's affidavit on the motion for a new trial shows that the witness on whom he relies is in the government employ, he may be excused for not presenting his affidavit.<sup>24</sup> When a case has been dismissed for want of prosecution, it will not be reinstated unless the petition states a cause of action.<sup>25</sup>

A new trial may be granted on motion of the United States, within two years after the "final disposition" of the claim,

<sup>12</sup> Deeson v. U. S., 5 Ct. Cl. 626.

<sup>13</sup> Armstrong v. U. S., 6 Ct. Cl. 26.

<sup>14</sup> Garrison v. U. S., 2 Ct. Cl. 382;  
s. c., 7 Wall. 688.

<sup>15</sup> Bramhall v. U. S., 6 Ct. Cl. 238.

<sup>16</sup> Silvey v. U. S., 7 Ct. Cl. 305;  
Payan v. U. S., 15 Ct. Cl. 56.

<sup>17</sup> Payan v. U. S., 15 Ct. Cl. 56.

<sup>18</sup> Rhine v. U. S., 15 Ct. Cl. 59.

<sup>19</sup> Calhoun v. U. S., 14 Ct. Cl. 193.

<sup>20</sup> Fendall v. U. S., 12 Ct. Cl. 305.

<sup>21</sup> Murphy v. U. S., 15 Ct. Cl. 217.

<sup>22</sup> Ibid.

<sup>23</sup> Jaeger v. U. S., 33 Ct. Cl. 214.

<sup>24</sup> Murphy v. U. S., 15 Ct. Cl. 217.

<sup>25</sup> Whitney v. U. S., 18 Ct. Cl. 19;  
Flores v. U. S., 18 Ct. Cl. 352; Wade  
v. U. S., 21 Ct. Cl. 141.

although the judgment of the court has been affirmed and the mandate of affirmance filed.<sup>26</sup> The words "final disposition" mean the final determination on appeal, if taken, or if there is none, then its final determination in the Court of Claims.<sup>27</sup> The Court of Claims has the right to determine whether or not the motion for a new trial was made in time, and its decision is not subject to review if it has jurisdiction to act.<sup>28</sup> A motion on behalf of the United States need not be disposed of within two years.<sup>29</sup> A motion for a new trial on behalf of the United States may be made while an appeal is pending in the Supreme Court, and that court will not dismiss an appeal because of such motion; unless the motion is granted and a new trial ordered.<sup>30</sup> The right of the United States to move for a new trial is analogous to the right of an individual to file a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.<sup>31</sup> Neither the lack of diligence nor the laches of the officers of government is sufficient ground for a new trial.<sup>32</sup> A new trial on motion of the United States will be granted, if it appears *prima facie* that wrong had been done the government.<sup>33</sup>

*Ex parte* testimony admitted on the hearing of a motion is sufficient to warrant the granting of a new trial.<sup>34</sup> If an unsatisfied judgment which might have been pleaded as a set-off existed, but was unknown to the defendant's attorney at the trial, it is cause for a new trial.<sup>35</sup> A new trial cannot be granted to the United States, because certain evidence which was not deemed material was not offered on the first trial; nor if allowed, it will enable the defendant to interpose a technical defense against a just claim.<sup>36</sup> An error of law which may be corrected on appeal is not a ground for a new trial.<sup>37</sup>

§ 455. Judgments in Court of Claims.— "Any person who corruptly practices or attempts to practice any fraud against

<sup>26</sup> *Ex parte* U. S., 16 Wall. 699.

<sup>27</sup> *Ex parte* Russell, 13 Wall. 664.

<sup>28</sup> *Young v. U. S.*, 95 U. S. 641; *U. S. v. Crusell*, 12 Wall. 175.

<sup>29</sup> *Bellocq v. U. S.*, 18 Ct. Cl. 195.

<sup>30</sup> *U. S. v. Ayres*, 9 Wall. 608; s. c. as *Ayers v. U. S.*, 5 Ct. Cl. 712; *U. S. v. Young*, 94 U. S. 258.

<sup>31</sup> *Ex parte* Russell, 13 Wall. 664. See *supra*, §§ 353-358.

<sup>32</sup> *Child v. U. S.*, 6 Ct. Cl. 44.

<sup>33</sup> *Douglas v. U. S.*, 11 Ct. Cl. 655; *Ayers v. U. S.*, 5 Ct. Cl. 712; s. c. as *U. S. v. Ayres*, 9 Wall. 608; *Tait v. U. S.*, 5 Ct. Cl. 638.

<sup>34</sup> *Ayers v. U. S.*, 5 Ct. Cl. 712.

<sup>35</sup> *Childs v. District of Columbia*, 19 Ct. Cl. 332.

<sup>36</sup> *Ford v. U. S.*, 18 Ct. Cl. 62, 70.

<sup>37</sup> *Ealer v. U. S.*, 5 Ct. Cl. 708.

the United States in the proof, statement, establishment, or allowance of any claim, or of any part of any claim against the United States, shall *ipso facto* forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.”<sup>1</sup> Such a finding may be made upon a new trial, although the original judgment has been paid, and the claimant fails to appear.<sup>2</sup>

“No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.”<sup>3</sup>

“In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid.”<sup>4</sup>

Where a claim was referred under a special act to the Court of Claims to be determined according to the rules and regulations heretofore adopted by the United States in settlement of like cases, in which interest had been allowed, it was held that interest might be allowed when previously allowed by Congress in the adjustment of like cases.<sup>5</sup> Where a factor had filed a claim against the proceeds of captured or abandoned property, which exceeded his original claim, it was held that he might be allowed interest up to the time of the rendition of the judgment.<sup>6</sup>

Interest on a judgment begins to run when a certified copy is presented for payment, and ceases when the mandate of affirmance is issued or ordered to be issued.<sup>7</sup> It has been held

§ 455. <sup>1</sup>U. S. R. S., § 1086. For a form of a judgment in such a case, see *Peychaud v. U. S.*, 16 Ct. Cl. 601, and *U. S. v. Moore*, 3 MacA. 226, 233.

<sup>2</sup>*Peychaud v. U. S.*, 16 Ct. Cl. 601.

<sup>3</sup>U. S. R. S., § 1091; *Hobbs v. U. S.*, 19 Ct. Cl. 220; *Tilson v. U. S.*, 100 U. S. 48; *Harvey v. U. S.*, 113 U. S. 243.

<sup>4</sup>U. S. R. S., § 1090.

<sup>5</sup>*U. S. v. McKee*, 91 U. S. 442; s. c. as *McKee v. U. S.*, 10 Ct. Cl. 208 and 231.

<sup>6</sup>*Villalonga v. U. S.*, 10 Ct. Cl. 428; s. c. as *U. S. v. Villalonga*, 23 Wall. 35.

<sup>7</sup>*Hobbs v. U. S.*, 19 Ct. Cl. 220. Interest was allowed under the general



that the amount of judgment cannot be corrected after its satisfaction, even though there was an arithmetical error in the court's opinion.<sup>8</sup>

"Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy."<sup>9</sup>

It has been held that this section relates only to judgments upon the merits, and does not change the rule of common law, nor does it do more than attach to final judgments the conclusiveness which the common law ascribes to them.<sup>10</sup> A judgment sustaining a demurrer to a petition which failed to allege the necessary facts does not bar an action founded upon a petition which alleges such fact.<sup>11</sup> A judgment in favor of the United States on a suit for a breach of covenant to furnish specified freight for transportation does not bar an action for the consideration agreed to be paid for the freight actually transported.<sup>12</sup>

A final judgment is conclusive, although the Supreme Court subsequently reverses a similar judgment, and holds that the decision of the Court of Claims in the case in question was erroneous.<sup>13</sup> An action for rent due in instalments may be brought as frequently as the respective sums become due, and a judgment in the suit for one instalment will not bar a judgment to recover rent not due at the time when the first petition was filed.<sup>14</sup> A judgment of the Court of Claims to which an appeal is taken, is not a final judgment within the meaning of the statute.<sup>15</sup> When a claimant has consented to a judgment against him on a general demurrer, he cannot subsequently sue on the same cause of action with substantially the same averments.<sup>16</sup>

"In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the pay-

terms of a special statute in *U. S. v. Old Settlers*, 148 U. S. 427, 478.

<sup>8</sup> *Russell v. U. S.*, 15 Ct. Cl. 168.

<sup>9</sup> U. S. R. S., § 1093.

<sup>10</sup> *Spicer v. U. S.*, 5 Ct. Cl. 84.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Shrewsbury v. U. S.*, 9 Ct. Cl. 263.

<sup>13</sup> *Osborn v. U. S.*, 9 Ct. Cl. 153.

<sup>14</sup> *Cross v. U. S.*, 14 Wall. 479; s. c., 8 Ct. Cl. 1; s. c., 5 Ct. Cl. 88.

<sup>15</sup> *Green v. U. S.*, 18 Ct. Cl. 98.

<sup>16</sup> *Porter v. U. S.*, 20 Ct. Cl. 307.

ment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court.”<sup>17</sup>

Appropriation acts usually provide that no judgment shall be paid until the right of appeal has expired.<sup>18</sup> An appeal from a judgment before the right to appeal has expired is not vacated by the appropriation by Congress of the amount to pay the judgment.<sup>19</sup> It has been held that an appropriation for the payment of “private claims” means claims which the Executive Departments have rejected, or over which they have no jurisdiction; and that the appropriation is for debts not to be paid out of the specific appropriations.<sup>20</sup>

“The payment of the amount due by any judgment of the Court of Claims and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.”<sup>21</sup>

§ 456. **Costs in the Court of Claims.**—If the United States puts in issue the plaintiff’s right to recover, the court may in its discretion allow the prevailing party, whether plaintiff or defendant, costs from the time of joining such issue.<sup>1</sup> The writs include only disbursements for witnesses’ and clerk’s fees.<sup>2</sup>

§ 457. **Appeals from Court of Claims.**—“An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine.”<sup>1</sup> The following rule regulates the practice in such appeals: “In all cases hereafter decided in the Court of Claims in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and

<sup>17</sup> U. S. R. S., § 1089.

<sup>18</sup> See for example, 21 St. at L. 252, ch. 234.

<sup>19</sup> U. S. v. Jones, 119 U. S. 477.

<sup>20</sup> Sweeney v. U. S., 5 Ct. Cl. 285, 290; s. c., 8 Ct. Cl. 134; s. c., 17 Wall. 75.

<sup>21</sup> U. S. R. S., § 1092. See Hobbs v.

U. S., 19 Ct. Cl. 220; U. S. v. Frerichs, 124 U. S. 315, 320; s. c. as Freirichs v. U. S., 21 Ct. Cl. 16.

§ 456. <sup>1</sup> 24 St. at L. 503, § 15.

<sup>2</sup> 24 St. at L. 503, § 15.

§ 457. <sup>1</sup> U. S. R. S. § 707. See Chapter on Writs of Error and Appeals.

none other: 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case. 2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.”<sup>2</sup> “In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.”<sup>3</sup> “In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal.”<sup>4</sup> “In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.”<sup>5</sup> “In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.”<sup>6</sup>

<sup>2</sup> Appeals from Ct. Cl., Rule 1.

<sup>3</sup> Appeals from Ct. Cl., Rule 2.

<sup>4</sup> Appeals from Ct. Cl., Rule 3.

<sup>5</sup> Appeals from Ct. Cl., Rule 4.

<sup>6</sup> Appeals from Ct. Cl., Rule 5.

“Application for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing, and signed by the claimant or his attorney of record, if the appeal be on his behalf; or if taken by the United States, it must be signed by the Attorney-General or his assistant.”<sup>7</sup> “Such application, if made when the court is not in session, must be filed with the clerk, and the date of filing the same must be indorsed upon it and noted upon the general docket.”<sup>8</sup>

Upon an appeal from the Court of Claims only questions of law are involved<sup>9</sup> except under special statutes.<sup>10</sup> Where both parties appeal, although the items of the disallowance of which the plaintiff complains amount to less than three thousand dollars, still he may avail himself of anything in the case which properly shows that the judgment in his favor was not for too large a sum; and consequently if the appeal of the United States is sustained in part, the items which were improperly disallowed may be set off against those which were improperly allowed.<sup>11</sup>

<sup>7</sup> Ct. CL Rule 82.

<sup>8</sup> Ct. CL Rule 83.

<sup>9</sup> *Talbert v. U. S.*, 155 U. S. 45.

<sup>10</sup> Where Congress directs the Court of Claims to take jurisdiction in equity of a controversy, the Su-

preme Court on appeal may review the facts and the evidence must be certified with the transcript. *U. S. v. Old Settlers*, 148 U. S. 427, 463, 464. See *Harvey v. U. S.*, 105 U. S. 671, 691.

<sup>11</sup> *U. S. v. Mosby*, 133 U. S. 273, 281.

## CHAPTER XXXII.

### PRACTICE BEFORE THE COURT OF PRIVATE LAND CLAIMS.

By E. A. Bowers, Esq., of the Bar of Washington, D. C., formerly Inspector of the Public Land Service.

§ 458. *Introductory.*—This court was created by the Act of March 3rd, 1891,<sup>1</sup> for the purpose of finally disposing of long pending claims to land, based upon grants of Spain and Mexico to private parties prior to the acquisition by the United States of the territory in which these lands are situated, under the treaty of Guadalupe Hidalgo,<sup>2</sup> of the 2nd of February, 1848, and the treaty of December 30, 1853, commonly known as the Gadsden Purchase.<sup>3</sup> Although these titles would have been recognized without any treaty stipulations by the principles of international law,<sup>4</sup> yet both of these treaties contain a special proviso requiring the recognition and confirmation of these grants by the United States after a proper investigation and proof of the same.<sup>5</sup> The Treaty of Guadalupe Hidalgo provided:

“Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever. Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United

§ 458. <sup>1</sup> 26 St. at L. 854, ch. 539.

<sup>2</sup> 9 St. at L. 922.

<sup>3</sup> 10 St. at L. 1031.

<sup>4</sup> Woolsey's Int. Law, p. 274; U. S. v. Percheman, 7 Pet. 51, 86; Soulard

v. U. S., 4 Pet. 511; Leitensdorfer v. Webb, 20 How. 176; U. S. v. Augisola, 1 Wall. 352.

<sup>5</sup> U. S. v. Repentigny, 5 Wall. 211; U. S. v. Moreno, 1 Wall. 400.

States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States. In the said territories, property<sup>6</sup> of any kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.”<sup>7</sup>

By protocol, made the 26th of May, 1848, between the Commissioners of the United States and Mexico it was explained that —

“The American government by suppressing the 10th article of the treaty of Guadalupe, did not intend in any way to annul the grants of lands made by Mexico in the ceded territories. These grants, notwithstanding the suppressing of the article of the treaty, preserve their legal value, which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals. Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican laws of California and New Mexico, up to the 13th of May, 1846, and in Texas, up to the 13th of March, 1836.”<sup>8</sup>

The declaration of the Mexican commissioners that no grants of land were made by Mexican governors, after May 13, 1846, cannot affect the rights of parties under grants made after that date, while the governors still had in fact authority.<sup>9</sup> July 7, 1846, is the date recognized by our political department as the termination of the authority of such governors,

<sup>6</sup> *Bryan et al. v. Kennett et al.*, 113 U. S. 179. “The term ‘property’ in contract, executory as well as executed.”

comprehends every species of title, inchoate or complete, legal or equitable, and embraces rights which lie

<sup>7</sup> Art. VIII; 9 St. at L. 922.

<sup>8</sup> *Public Treaties of the U. S.*, p. 502.

<sup>9</sup> *U. S. v. Pico*, 23 How. 406; *U. S. v. Yorba*, 1 Wall. 412.



and this the judiciary follows.<sup>10</sup> The authority of the former government existed while in actual possession.<sup>11</sup>

By the Gadsden Purchase, a treaty between Mexico and the United States, concluded December 30, 1853, it was provided that,—

“All the provisions of the eighth and ninth, sixteenth and seventh articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and effectually as if the said articles were herein again recited and set forth.”<sup>12</sup>

“No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day—twenty-fifth of September—when the minister and subscriber to this treaty on the part of the United States proposed to the government of Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.”<sup>13</sup>

**§ 459. Former method of settlement, and decisions as to validity of Mexican and Spanish land grants.**—For many years the adjustment of these claims has been attempted through the instrumentality of the General Land Office, followed by a Congressional reference and confirmation.<sup>1</sup> Many grants prior to 1871 were in this way finally disposed of; but there are still pending, now forty years after the treaties, a large number of unconfirmed grants, where the intricacies are so great that Congress seems to have been unwilling to act.

<sup>10</sup> *Mumford v. Wardwell*, 6 Wall. 423; *Stearns v. U. S.*, 6 Wall. 589; *U. S. v. Wilson*, 1 Black, 267; *U. S. v. Castillero*, 2 Black, 17; *Hornsby v. U. S.*, 10 Wall. 224; *Alexander v. Roulet*, 13 Wall. 386.

<sup>11</sup> *U. S. v. Watkins*, 97 U. S. 219.

<sup>12</sup> Art. V; 10 St. at L. 1031.

<sup>13</sup> Art. VI; 10 St. at L. 1031.

§ 459. <sup>1</sup> Act of July 22, 1854, 10 St. at L. 308; Arizona, July 15, 1870, 16 St. at L. 291; Colorado, Feb. 28, 1861,

12 St. at L. 172; Utah, March 14, 1862, 12 St. at L. 355; Wyoming, Feb. 5, 1870, 16 St. at L. 64; Nevada, March 2, 1861, 12 St. at L. 209. Examples of Congressional confirmation in accordance with Act of July 22, 1854: 11 St. at L. 374; 12 St. at L. 71; 12 St. at L. 887; 13 St. at L. 125; 14 St. at L. 588; 15 St. at L. 438; 15 St. at L. 275; 15 St. at L. 342; 16 St. at L. 373; 20 St. at L. 592.

In cases of such difficulty as these, a judicial investigation was clearly the only possible means of a satisfactory and fair adjustment, and the bill recently passed is similar to bills for the purpose that have been pending before many previous Congresses. Such judicial investigation is now for the first time possible by this Court of Private Land Claims, under the Act of March 3, 1891.<sup>2</sup> Similar legislation has been held constitutional.<sup>3</sup> The cases referred to throughout this chapter are principally decisions of the Federal courts upon the Act of March 3, 1851, relating to private land claims in California, while the lands to which this new act applies are situated in other States and Territories than California, and have heretofore fallen under the Act of 1854.<sup>4</sup> These decisions therefore are not directly in point; but as the subject-matter is the same, and the provisions of the earlier act evidently influenced the act creating this court, we may regard them as valuable precedents by analogy.<sup>5</sup>

<sup>2</sup> 26 St. at L. 854, ch. 539.

<sup>3</sup> *Beard v. Federy*, 8 Wall. 478.

<sup>4</sup> 9 St. at L. 631, ch. 41.

<sup>5</sup> *U. S. v. Cambuston*, 20 How. 59.

*Interpretation of Mexican Law and Grants*.—The laws of Mexico are not regarded as foreign laws, but as those of an antecedent government. *Fremont v. U. S.*, 17 How. 542; *U. S. v. Cambuston*, 20 How. 59, 64; *U. S. v. Perot*, 98 U. S. 428. The authority of the former government continued while in actual possession. *U. S. v. Watkins*, 97 U. S. 219. The authority of Mexican officials ceased after July 7, 1846. *U. S. v. Pico*, 22 How. 406; *U. S. v. Wilson*, 1 Black, 267; *U. S. v. Yorba*, 1 Wall. 412; *Mumford v. Wardwell*, 6 Wall. 423; *Hornsby v. U. S.*, 10 Wall. 224; *More v. Steinbach*, 127 U. S. 70. The law of 1824 and Regulations of 1828 were the only laws in force for granting public lands in California, at the acquisition of that territory by the United States. *Bouldin v. Phelps*, 80 Fed. R. 547. Grants not recognized by Mexico are rejected by the United States. *Zia v. U. S.*, 168 U. S.

198; *U. S. v. Sutter*, 21 How. 170; *U. S. v. Nye*, 21 How. 408; *U. S. v. Bassett*, 21 How. 412; *U. S. v. Bennitz*, 23 How. 255; *U. S. v. Rose*, 23 How. 262; *Cessna v. U. S.*, 169 U. S. 165. A grant valid against Mexico, although no particular tract had been designated at the cession to the United States, was held to be valid. *Fremont v. U. S.*, 17 How. 542. The governors had the right to make grants in conformity with the law of 1824 and Regulations of 1828. *U. S. v. Peralta*, 19 How. 343; *Mumford v. Wardwell*, 6 Wall. 423; *Bouldin v. Phelps*, 30 Fed. R. 547. See *Canon v. U. S.*, 171 U. S. 277; *Perrin v. U. S.*, 171 U. S. 292. The governor's decree, sometimes, was only a personal license. Such a title is not recognized by the United States. *De Haro v. U. S.*, 5 Wall. 599; *Serrano v. U. S.*, 5 Wall. 451.

A prefect had no such power in 1840. *Crespin v. U. S.*, 168 U. S. 208. An intendant had such power after the separation of Mexico from Spain. *Ely v. U. S.*, 171 U. S. 220. An approval of a grant by the government

**§ 460. Organization of the Court of Private Land Claims.** The court consists of a chief justice and four associate justices appointed by the President with the advice and consent

of Sonora in 1838 was not an approval by the national government of Mexico. *U. S. v. Coe*, 170 U. S. 681. The departmental treasurer of Sonora had no such power. *Faxon v. U. S.*, 171 U. S. 244. As to the power of an *alcalde*, see *Hays v. U. S.*, 175 U. S. 248; *U. S. v. Pena*, 175 U. S. 500. As to the power of a treasurer of a department, *Faxon v. U. S.*, 171 U. S. 244. In 1833, and thence till 1838, the several States in Mexico had the power to grant land within their respective limits. *Camon v. U. S.*, 171 U. S. 277; *Perrin v. U. S.*, 171 U. S. 292. But the territorial deputation of New Mexico had not. *Hays v. U. S.*, 170 U. S. 637.

A departmental assembly had no power to make grants, *U. S. v. Vigil*, 13 Wall. 449; not even when the governor presided, *Chavez v. U. S.*, 175 U. S. 552. Departmental assemblies had the right to confirm, reject, or modify concessions of the governor, and such action was conclusive. *U. S. v. Hartnell*, 22 How. 286. The absence of approval by a departmental assembly does not necessarily defeat a grant. *U. S. v. Hartnell*, 22 How. 286; *U. S. v. Sutter*, 21 How. 170; *Beard v. Federy*, 8 Wall. 478; *Bouldin v. Phelps*, 30 Fed. R. 547. It was the duty of the governor, and not of the grantee, to submit a grant to the assembly, and his neglect to do so would not divest title. *Hornsby v. U. S.*, 10 Wall. 224; *Bouldin v. Phelps*, 30 Fed. R. 547. Delivery by juridical possession was necessary for a complete title. *Graham v. U. S.*, 4 Wall. 259; *More v. Steinbach*, 127 U. S. 70. Mere possession without a grant confers no title. *U. S. v. Chaboya*, 2 Black, 598; *Peralta v. U. S.*, 3 Wall. 484; *Serrano v. U. S.*, 5 Wall.

451; *Hornsby v. U. S.*, 10 Wall. 224. Nor does a grant without possession. *U. S. v. Repentigny*, 5 Wall. 211; *More v. Steinbach*, 127 U. S. 70. Time may act as a bar to a claim. *Manning v. San Jacinto Tin Co.*, 9 Fed. R. 726. A condition in a Mexican grant inconsistent with the public policy of the United States is held to have been annulled by the conquest. *Fremont v. U. S.*, 17 How. 542. When a condition precedent is not fulfilled no title passes; it is not a grant, but only a contract to convey upon performance of the condition. *Interstate L. Co. v. Maxwell L. G. Co.*, 41 Fed. R. 275.

Non-compliance with the conditions of a grant does not work a forfeiture, unless an intention to abandon a grant is shown. *Fremont v. U. S.*, 17 How. 542, 560; *U. S. v. Reading*, 18 How. 1. Nor does a condition subsequent. *U. S. v. Vaca*, 18 How. 556. See *Gonzales v. Ross*, 120 U. S. 605. A condition of settlement may be complied with in a reasonable time. *U. S. v. Larkin*, 18 How. 557. Absence of proof of survey or performance of condition show abandonment. *Fuentes v. U. S.*, 22 How. 448. When there is an express condition that a certain act must be performed within three years, and this is not done, the grant will not be sustained in the absence of a proper excuse. *McMicken v. U. S.*, 97 U. S. 204. Conditions as to inhabitancy and cultivation are not strictly enforced, *Fremont v. U. S.*, 17 How. 542; *U. S. v. Larkin*, 18 How. 557; *U. S. v. Reading*, 18 How. 1; *U. S. v. Yorba*, 1 Wall. 412; but an unreasonable delay works a forfeiture, *U. S. v. Reading*, 18 How. 1. The failure of authorities to perform their duty

of the Senate, who hold their offices until June 30, 1902,<sup>1</sup> originally till December 31, 1895.<sup>2</sup> On this date the court ceases to exist, unless its term is again extended by Congress.<sup>3</sup> Three of these judges constitute a quorum.<sup>4</sup> The act also provides for the appointment of a clerk, "who shall attend all sessions of the court," and a deputy clerk for each place of holding the

does not work a forfeiture of the grant. *Fremont v. U. S.*, 17 How. 542.

A confirmation by the Mexican authorities will be reversed or denied when all the circumstances show probable fraud in the grant — as alteration in the title papers, or a date just previous to the possession of the United States, or no possession of the lands granted by the claimants, or slight evidence of the genuineness of the grant. *U. S. v. Galbraith*, 22 How. 89; *U. S. v. Pico*, 28 How. 321; *U. S. v. Castro*, 24 How. 346; *U. S. v. Knight*, 1 Black, 227; *U. S. v. Auguisola*, 1 Wall. 352. A legislative grant is construed most strongly against the grantee. *Sidell v. Grandjean et al.*, 111 U. S. 412. A Spanish or Mexican title does not convey the minerals contained in the land granted, nor any interest in them. Mines and minerals can only be acquired under the mining ordinances. The Mexican colonization law of 1824 and the Regulations of 1828, pursuant thereto, do not apply to mineral lands, or mines, which could not be granted thereunder. *U. S. v. Castillero*, 2 Black, 17, 217. Where Congress authorizes a court to examine private land claims, the United States being a party therein, and in deciding it "to be governed by the law of nations and of the country from which the title is derived; by principles of natural justice and according to the law of nations and the stipulations of treaties, an objection of mere alienage and consequent incapacity to take or hold must be regarded as waived." *U. S. v. Re-*

*pentigny*, 5 Wall. 211. See also *U. S. v. Reading*, 18 How. 1. A grant to an infant is voidable, not void. *Palmer v. Low*, 98 U. S. 1. By the laws of Mexico, an Indian is capable of receiving and holding a grant the same as a white person. *U. S. v. Ritchie*, 17 How. 525. And they have the same rights as citizens of the United States. *U. S. v. Santistevan*, 1 N. M. 588; *U. S. v. Lucero*, 1 N. M. 422. The assignment of Pueblo lands upon petition is sufficient evidence of title. *U. S. v. Pico*, 5 Wall. 586. Without such assignment recognition by the United States is necessary. *Grisar v. McDowell*, 6 Wall. 363. Grants of lands to towns, under Mexican law, are protected by the treaty of Guadalupe Hidalgo, and such lands are to be held in trust for the inhabitants. *Townsend v. Greeley*, 5 Wall. 326; *Lynch v. Bernal*, 9 Wall. 315. A pueblo or town, duly formed and officially recognized, became entitled to the use of certain lands, which were upon petition assigned to it, and such assignment was a sufficient evidence of title. *U. S. v. Pico*, 5 Wall. 586. "The decisions of this court in cases of claims to land in Louisiana and Florida are not applicable where precise and recent regulations exist, directing the manner in which land shall be granted." *U. S. v. Cambuston*, 20 How. 59.

§ 460. <sup>1</sup> 26 St. at L. 854, § 19; 29 St. at L. 577; 31 St. at L. 132.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> 26 St. at L. 854, § 1.

*regular* terms of the court,<sup>5</sup> an official stenographer,<sup>6</sup> an attorney,<sup>7</sup> to represent the United States in this court, and an interpreter and translator “skilled in the Spanish and English languages.”<sup>8</sup> The United States marshal for any district or territory in which the court is held, is required to serve the process of the court, and “to attend the court in person, or by deputy when so directed by the court.”<sup>9</sup>

**§ 461. Time and place of holding the court.**— The sessions of the court are to be held, at the discretion of the court,<sup>1</sup> within the States of Colorado, Wyoming, and Nevada, and in the Territories of New Mexico, Arizona, and Utah. Notice of the time and place of holding sessions must be given by publication, in Spanish and English, in one newspaper at the capital of the State or Territory in which the session is to be held, “once a week for two successive weeks, the last of which publications shall not be less than thirty days next preceding” the time of the holding such session.<sup>2</sup> Sessions may be adjourned from time to time by the court without publication.<sup>3</sup> “Immediately upon the organization of said court the clerk shall cause notices thereof, and of the time and place of the first session thereof, to be published for a period of ninety days in one newspaper at the City of Washington, and in one published at the capital of the State of Colorado and of the Territories of Arizona and New Mexico; such notices shall be published in the Spanish and English languages, and shall contain the substance of this act.”<sup>4</sup>

**§ 462. Jurisdiction of the Court of Private Land Claims.** The Court of Private Land Claims is a court of exclusive and limited jurisdiction. All previous legislation in reference to Spanish and Mexican grants in the territory covered by this act is repealed, as follows: “That sec. 8 of the Act of Congress approved July 22nd, 1854,<sup>1</sup> entitled ‘An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes,’ and all acts amendatory or in extension

<sup>5</sup> 26 St. at L. 854, § 1.

<sup>6</sup> 26 St. at L. 854, § 1.

<sup>7</sup> 26 St. at L. 854, § 2.

<sup>8</sup> 26 St. at L. 854, § 2.

<sup>9</sup> 26 St. at L. 854, § 1.

§ 461. <sup>1</sup> 26 St. at L. 854, § 1.

<sup>2</sup> 26 St. at L. 854, § 1.

<sup>3</sup> 26 St. at L. 854, § 1.

<sup>4</sup> 26 St. at L. 854, § 8.

§ 462. <sup>1</sup> 10 St. at L. 808, ch. 103.

thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.”<sup>2</sup>

The jurisdiction<sup>3</sup> of this court is limited to the hearing and decision of private land claims which are (1) derived from some Spanish or Mexican grant, concession, warrant, or survey; and (2) located within the States of Colorado, Nevada, or Wyoming, or the Territories of New Mexico, Arizona, or Utah. In such claims the court has power to determine all questions relating to<sup>4</sup> (a) the title of the land the subject of the case; (b) its location, extent, and boundaries; (c) any other matters necessary to finally disposing of the claim; (d) and by a final decree to settle the validity of the title and the boundaries of the grant presented for adjudication, and any other questions “properly arising between the claimants or other parties in the case and the United States.”

This jurisdiction is applicable to the five following classes of cases:—

*First.* To those which “at the date of the passage of this act have not been confirmed by act of Congress or otherwise finally decided upon by lawful authority, and which are not already complete and perfect,” upon the application of the claimant.<sup>5</sup>

*Second.* To those which were “complete and perfect at the date when the United States acquired sovereignty,” provided the holder of such grant voluntarily petitions the court to investigate and adjudicate his title.<sup>6</sup>

*Third.* Whenever the claimant or possessor of lands within the States or Territories to which this act applies, under a private grant from Spain or Mexico, has failed to come in voluntarily under the provisions of this act, and in the opinion of the head of the Department of Justice the public interests or the rights of any claimants require an investigation of such claim, the United States may institute proceedings against the title or boundaries of land so held.<sup>7</sup>

*Fourth.* Whenever there is a question as to “validity of any city lot, town lot, village lot, farm lot, or pasture lot claimed directly or mediately under any grant for the establishment of

<sup>2</sup> 26 St. at L. 854, § 15.

<sup>3</sup> 26 St. at L. 854, § 6.

<sup>4</sup> 26 St. at L. 854, § 7.

<sup>5</sup> 26 St. at L. 854, § 6.

<sup>6</sup> 26 St. at L. 854, § 8.

<sup>7</sup> 26 St. at L. 854, § 8.



any city, town, or village by the Spanish or Mexican government."<sup>8</sup>

*Fifth.* When any of the lands decreed to the claimant under the provisions of this act have been disposed of by the United States to any other person than the claimant, notwithstanding such decree, the court may render judgment in favor of the claimant for the value of the land so disposed of, exclusive of betterments, not exceeding \$1.25 per acre, which judgment shall be a charge upon the treasury of the United States.<sup>9</sup>

*Limitations on Jurisdiction.*—The following limitations upon the jurisdiction and powers of the court are imposed by the act:<sup>10</sup> 1. No claim shall be allowed unless the title is regularly and lawfully derived from Spain, Mexico, or a Mexican State, and is one which the United States is bound under its treaty stipulations, or otherwise, to respect. 2. Nor shall one be allowed that interferes with any just Indian title.<sup>11</sup> 3. Nor has the court jurisdiction to confirm any claim to gold, silver, or quicksilver mines, with certain exceptions.<sup>12</sup> 4. Nor has it jurisdiction in the face of a congressional confirmation.<sup>13</sup> 5. Nor do its decrees affect the rights of private parties between each other, being conclusive only between the United States and the parties claiming an interest in the land.<sup>14</sup> 6. Nor do its decrees operate to make the United States liable in any respect for such grants, being a release only by the United States of such title as it may have.<sup>15</sup> 7. Nor can the court confirm any incomplete grant for a greater quantity than eleven square leagues of land.<sup>16</sup> 8. Nor can the court confirm any grant unless all the conditions of the grant have been complied with strictly.<sup>17</sup>

<sup>8</sup> 26 St. at L. 854, § 11; Townsend v. Greeley, 5 Wall. 326; U. S. v. Pico, 5 Wall. 536; Grisar v. McDowell, 6 Wall. 363; Lynch v. Bernal, 9 Wall. 315.

<sup>9</sup> 26 St. at L. 854, § 14.

<sup>10</sup> 26 St. at L. 854, § 13.

<sup>11</sup> U. S. v. Ritchie, 17 How. 523.

<sup>12</sup> U. S. v. Castillero, 2 Black, 17.

<sup>13</sup> Const., art. IV, § 1; Tameling v. U. S. Freehold & E. Co., 93 U. S. 644; Maxwell Land Grant Case, 121 U. S. 325; Ibid., 122 U. S. 365. See Las Animas L. G. Co. v. U. S., 179 U. S.

201; U. S. v. Conway, 175 U. S. 60; Real de Dolores del Oro v. U. S., 175 U. S. 71.

<sup>14</sup> Castro v. Hendricks, 23 How. 438; U. S. v. Grimes, 2 Black, 610; U. S. v. Morillo, 1 Wall. 706. See also § 8; Beard v. Federy, 3 Wall. 478.

<sup>15</sup> 26 St. at L. 854, ch. 539, § 13, subdivision 6. See also § 8 of same act.

<sup>16</sup> But courts have no jurisdiction to limit a grant when confirmed by Congress. See cases under note 13, *supra*.

<sup>17</sup> McMicken v. U. S., 97 U. S. 204.

9. Nor can the court confirm, in the case of completed grants, showing perfect title, any more land than a perfect title may be found to cover.<sup>18</sup> 10. Nor any lands disposed of by the United States,<sup>19</sup> although they might have been originally a part of a valid grant or claim,<sup>20</sup> and been so decreed to be by this court. The Act of 1851<sup>21</sup> contemplated nothing more than the separation of private lands from the public domain.<sup>22</sup> Where the government was not shown to be a party in interest, it was held that the court had no jurisdiction under the Act of 1851.<sup>23</sup> That act did not settle disputes between private parties.<sup>24</sup> It was not necessary that a grant should be in writing to give jurisdiction under the Act of March 3, 1851. Jurisdiction may rest on the general law of the land.<sup>25</sup> The Court of Private Land Claims can only confirm legal titles; and not claims of imperfect obligation even when they are of a similar character to claims which Congress<sup>26</sup> or the Mexican government<sup>27</sup> has confirmed.

**§ 463. Parties.**—"Any person or persons, or corporation or their legal representatives,"<sup>1</sup> claiming lands falling within the jurisdiction of this court, may bring a petition in writing to the court setting forth the claim, whether such claim was complete or incomplete upon the acquisition of this territory by the United States. The claim for a city, town, village, etc., grant must be presented by the corporate authorities of the city or village, if under a grant for the establishment of a city or village by the Spanish or Mexican authorities, but if the land upon which the city or village is situated "was originally granted

Proof that the Mexican authorities prevented the performance of the conditions does not establish a waiver of the same. *Cessna v. U. S.*, 169 U. S. 165.

<sup>18</sup> 26 St. at L. 854, § 8.

<sup>19</sup> 26 St. at L. 854, § 8.

<sup>20</sup> 26 St. at L. 854, § 14.

<sup>21</sup> *Castro v. Hendricks*, 23 How. 438.

<sup>22</sup> 9 St. at L. 631, ch. 41.

<sup>23</sup> *U. S. v. Morillo*, 1 Wall. 706.

<sup>24</sup> *Castro v. Hendricks*, 23 How. 438; *U. S. v. Grimes*, 2 Black, 610.

<sup>25</sup> *Beard v. Federy*, 3 Wall. 478.

<sup>26</sup> *Rio Arriba L. & C. Co. v. U. S.*, 167 U. S. 298; *Bergere v. U. S.*, 168

*U. S.* 66; *U. S. v. Santa Fe*, 165 U. S. 675; *U. S. v. Sandoval*, 167 U. S. 278. But see *Ely v. U. S.*, 171 U. S. 220.

<sup>27</sup> *Crespin v. U. S.*, 168 U. S. 208.

§ 463. <sup>1</sup> 26 St. at L. 854, §§ 6, 8; *Hunnicut v. Peyton*, 102 U. S. 333; *U. S. v. Covilland*, 1 Black, 339; *U. S. v. Grimes*, 2 Black, 610; *U. S. v. Estudillo*, 1 Wall. 710; *U. S. v. Patterson*, 15 How. 10; *Alviso v. U. S.*, 8 Wall. 337; *U. S. v. Repentigny*, 5 Wall. 211; *U. S. v. Sutter*, 21 How. 170; *U. S. v. Reading*, 18 How. 1; *Palmer v. Low*, 98 U. S. 1; *U. S. v. Ritchie*, 17 How. 525; *McMicken v. U. S.*, 97 U. S. 204.

to an individual, the claim shall be presented by, or in the name of said individual or his legal representatives."<sup>2</sup> The United States may bring a petition against the holder of any private land claim if such holder has not voluntarily come into this court. This petition is to be brought by the Attorney of the United States in this court, by the direction of the head of the Department of Justice, "whenever in his opinion the public interests or the rights of any claimant shall require it."<sup>3</sup>

It is the duty of the court to protect the interests of minors,

<sup>2</sup> 26 St. at L. 854, § 11.

<sup>3</sup> 26 St. at L. 854, § 8; U. S. v. Throckmorton, 98 U. S. 61; U. S. v. White, 23 How. 249.

The United States are proper parties to a suit to confirm a claim covering pueblo lands granted to Indians. U. S. v. Conway, 175 U. S. 60.

The following decisions under former acts may be useful as affording precedents by analogy. U. S. v. Cambuston, 20 How. 59. Grantees of an original claimant may prosecute the claim in the name of their grantor. U. S. v. Sutter, 21 How. 170.

*Assignees.*—The assignee of the whole of the land granted could properly present the claim in his own name, but when the grant was divided among a number of vendees the original claimant should do this. U. S. v. Grimes, 2 Black, 610. The claimant of an unlocated grant may sell it, and his grantee takes his rights. Hunnicutt v. Peyton, 102 U. S. 333. A confirmation inures to an assignee by way of estoppel. Stoddard v. Chambers, 2 How. 284; U. S. v. Patterson, 15 How. 10. An assignee is bound by the decree of confirmation. U. S. v. Covilland, 1 Black, 339. After the issue of patent, an assignee can assert his rights against the original grantee in the ordinary tribunals. *Ibid.* A stranger to the title cannot ask a court to decree upon a claim. Parties prosecuting a title must show some real interest. McMicken v. U. S., 97 U. S. 204. When the United States

have no interest in the matter, the parties must have recourse to the regular courts, and the case will be remanded. U. S. v. White, 23 How. 249. The alienees of an original grantee may intervene to protect their rights *after* the execution of a survey in accordance with the decree of confirmation. U. S. v. Covilland, 1 Black, 339. But a mandamus will not be granted for the intervention of one Mexican claimant in the proceedings of another. *White's Adm'r v. U. S.*, 1 Black, 501. The location of a confirmed Mexican claim will not be disturbed at the instance of a third person, who shows no title to the land, the government and claimant being satisfied. *Dehon v. Bernal*, 3 Wall. 774. See also U. S. v. Estudillo, 1 Wall. 710; U. S. v. Patterson, 15 How. 10. Objection cannot be taken to an intervenor for the first time in the Supreme Court, after he has been allowed to intervene by order of the court of first instance. *Alviso v. U. S.*, 8 Wall. 337; U. S. v. Estudillo, 1 Wall. 710. A third party cannot raise the question of fraud as between the grantor and grantee, in ejectment proceedings. *Field v. Seabury*, 19 How. 323, 332. There is no right to intervene unless this is done in the court of first instance. U. S. v. Patterson, 15 How. 10. See also U. S. v. Innerarity, 19 Wall. 595; U. S. v. Sutter, 21 How. 170, 182; *Brown v. Evans*, 8 Saw. 502, 510.

married women, and persons *non compos mentis* in private land claims before it, by appointing a guardian *ad litem* and counsel.<sup>4</sup> Indians have the same rights as other citizens in these grants.<sup>5</sup>

§ 464. **Locality of proceeding.**—The petition is to be presented to the court at a regular session in the State or Territory where the land is situated.<sup>1</sup> Cases arising in States or Territories where the court does not hold regular sessions may be instituted at the place designated by the rules of the court.<sup>2</sup> The rule provides that actions for land “in Wyoming, Nevada, Arizona, or Utah, may at the election of the plaintiff be brought and presented at either of the places where the regular terms are held.”<sup>3</sup> These two places are Denver, Colorado, and Santa Fe, New Mexico.

§ 465. **Pleading and practice.**—Proceedings are instituted in this court by filing a petition in writing with the clerk of the court.<sup>1</sup> The proceedings and practice are in general the same, whether the grant was complete<sup>2</sup> or incomplete at the date of the acquisition by the United States of the territory within which the grant lies; or whether a petition is brought by a claimant to enforce his rights, or by the United States to determine any claim where the claimant has not voluntarily come into court;<sup>3</sup> or the claim is presented for a town or village lot by the authorities<sup>4</sup> of such town, or by a private person, the grantee of such land, in behalf of the holders of such town or village lots.<sup>5</sup> Actions in this court “shall be entitled in the name of such claimant or claimants as plaintiff against the United States, and such other person or persons as may be designated as holding or claiming adversely to the claimant as defendant.”<sup>6</sup> This title is to be preserved in all proceedings relating to the cause.<sup>7</sup> In all actions brought by instruction of the Department of Justice, the United States shall be designated as plaintiff, and the adverse party as the defendant, and this shall be the title in all proceedings relating to the cause.<sup>8</sup>

<sup>4</sup> 26 St. at L. 854, ch. 539, § 12.

<sup>5</sup> U. S. v. Ritchie, 17 How. 525.

§ 464. <sup>1</sup> 26 St. at L. 854, § 6; and Rules of Practice, Rule 1.

<sup>2</sup> 26 St. at L. 854, § 6, and Rules of Practice, Rule 1.

<sup>3</sup> Rules of Practice, Rule 1.

§ 465. <sup>1</sup> 26 St. at L. 854, § 6.

<sup>2</sup> 26 St. at L. 854, § 8.

<sup>3</sup> 26 St. at L. 854, § 8.

<sup>4</sup> 26 St. at L. 854, § 11.

<sup>5</sup> 26 St. at L. 854, § 11.

<sup>6</sup> Rule 1.

<sup>7</sup> Rule 1.

<sup>8</sup> Rule 1.

The petition<sup>9</sup> must set forth, (1) the nature of the claim to the lands; (2) the date and form of the grant, concession, or order of survey upon which the petitioner relies;<sup>10</sup> (3) by whom it was made; (4) the names of any persons in adverse possession of any of the land, or of claimants adverse to the petitioner; (5) the quantity of land claimed, its location and boundaries, together with as accurate a map of the land as can be furnished; (6) whether the claim or grant has been acted upon by Congress or any authorities of the United States charged with the adjustment of such land titles, or submitted to such authority; and if so, whether reported on unfavorably, or recommended for confirmation, or authorized to be surveyed or not; (7) and finally, the petition must pray that the validity of the claim must be investigated and decided by this court.<sup>11</sup> "Whenever any petitioner shall claim any rights by reason of an inheritance by a descent or by testamentary disposition, he shall set forth in his petition the name and citizenship of all deceased persons through whom it is claimed such right is derived, and the names of the heirs of such deceased persons, and shall set forth the law of the place affecting such right of inheritance."<sup>12</sup>

When the petition is filed, the original documents creating the grant and all intermediate original documents evidencing the title by which the petitioner claims, if in his possession, and a copy of any last will of a deceased person with copies of any probate records thereof, if the petitioner depends upon such will, must be delivered to the clerk of the court or his deputy.<sup>13</sup> The clerk or his deputy is required to receipt for all such original documents which remain in his possession until the final determination of the case.<sup>14</sup> If such original documents cannot be so delivered, the petitioner must explain whether they are beyond his control, or lost or destroyed, setting forth fully all the facts.<sup>15</sup> When the petition is filed, copies of it must be furnished the clerk for each person to be served,<sup>16</sup> and must, with citations to any adverse possessors or claimants, be immediately served upon such possessors or claim-

<sup>9</sup> U. S. v. Grimes, 2 Black, 610; Beard v. Federy, 8 Wall. 478; Pinkerton v. Ledoux, 129 U. S. 846.

<sup>10</sup> But see Beard v. Federy, 8 Wall. 478; U. S. v. De Morant, 123 U. S. 335.

<sup>11</sup> 26 St. at L. 854, § 6.

<sup>12</sup> Rule 2.

<sup>13</sup> Rule 2.

<sup>14</sup> Rule 2.

<sup>15</sup> Rule 2.

<sup>16</sup> Rule 2.

ants, and also upon the attorney for the United States, in the ordinary legal manner in the proper State or Territory.<sup>17</sup> At the time of filing this petition, all parties except the United States must deposit a sufficient sum with the clerk to pay the fees of the marshal for serving the copies of the petition and citations.<sup>18</sup> Within thirty days after service of the petition, the attorney for the United States, and also any adverse possessor, or claimant, must enter an appearance and plead, answer, or demur to the petition.<sup>19</sup> But the court or any judge thereof may upon a proper showing grant further time for answering, etc.<sup>20</sup> In default of plea, answer, or demurrer, after due notice, "the court shall proceed to hear the cause on the petition and proofs, and render a final decree" upon full legal proof and hearing, but every petition must be sustained by satisfactory proof, whether an answer or plea is filed or not.<sup>21</sup> When an answer, plea, or demurrer is made, testimony and proofs are taken as in other cases, and a decree is entered in accordance therewith.<sup>22</sup> Pleadings may be filed until the third day of the term at which the cause is returnable.<sup>23</sup> "All proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States,"<sup>24</sup> except, 1st, the attorney for the United States is not required to verify his answer, or applications or motions,<sup>25</sup> and, 2d, all testimony, as far as is practicable, must be taken in this court or before one of its judges.<sup>26</sup>

Rules of Practice have been adopted by virtue of the power granted "to adopt all necessary rules and regulations for the transaction of its business."<sup>27</sup> The court also has power to issue any necessary process, and to issue commissions to take depositions, as provided in the Revised Statutes.<sup>28</sup> The judges of this court can administer oaths and affirmations in all cases arising under this act,<sup>29</sup> may grant orders for taking testimony in vacation,<sup>30</sup> may hear and dispose of all interlocutory mo-

<sup>17</sup> 26 St. at L. 854, ch. 539, § 6.

<sup>18</sup> Rule 8.

<sup>19</sup> 26 St. at L. 854, § 6.

<sup>20</sup> 26 St. at L. 854, § 6.

<sup>21</sup> 26 St. at L. 854, § 6.

<sup>22</sup> 26 St. at L. 854, § 6.

<sup>23</sup> Rule 8.

<sup>24</sup> 26 St. at L. 854, § 7.

<sup>25</sup> 26 St. at L. 854, § 7, Rule 7.

<sup>26</sup> 26 St. at L. 854, § 7, Rule 7.

<sup>27</sup> 26 St. at L. 854, § 1.

<sup>28</sup> R. S., § 863 *et seq.*

<sup>29</sup> 26 St. at L. 854, § 1.

<sup>30</sup> 26 St. at L. 854, § 12.



tions;<sup>31</sup> and in general the court has the powers of a United States Circuit Court in preserving order, in compelling the production of books and papers or the attendance of witnesses, and in punishing contempts.<sup>32</sup> To determine the value of lands disposed of by the United States and to which a claimant is decided by the court to have been entitled, the court may order a survey to be made, or take proof as to the value of the land, either itself or by a commissioner appointed by the court.<sup>33</sup> All

<sup>31</sup> 26 St. at L. 854, § 12.

<sup>32</sup> 26 St. at L. 854, § 12.

<sup>33</sup> 26 St. at L. 854, § 14; 27 St. at L. 470; 26 St. at L. 854, § 10.

The following decisions under former acts may be of value here: A case might be reopened for newly-discovered evidence. *U. S. v. Rocha*, 9 Wall. 639. Where countries have been acquired by the United States, its courts take judicial notice of the laws which prevail there up to the time of such acquisition. Such laws are not foreign, but those of an antecedent government. *U. S. v. Perot*, 98 U. S. 428. Pending proceedings by a claimant under a Mexican grant to obtain a United States patent, if the claimant dies, the patent should issue to the widow and heirs to hold in trust for the estate. *Burton v. Burton*, 79 Cal. 490. A grant must first be shown to be valid before the conditions annexed to it or its boundaries can be judicially inquired into. *U. S. v. Castro*, 24 How. 346. Petitions filed both by the original grantees and assignees for the same land should be consolidated. *U. S. v. Grimes*, 2 Black. 610. Distinct parcels of land may be united in the same claim. *Beard v. Federy*, 3 Wall. 478. "Where the defendants pleaded severally the general issue, it was proper for the court below to instruct the jury to bring in a general verdict against all those who had not shown that they were in possession of separate parcels. The mode of proceeding by petition does not alter

the law of ejectment under the old system of pleading." *Greer et al. v. Mezes*, 24 How. 268.

"When a description contained in a petition and grant differs from that contained in the act of juridical possession, the former must prevail, as the latter is based upon them." *Pinkerton v. Ledoux*, 129 U. S. 346. "Reference to original title papers, where no doubt arises upon the terms of the decree, will not authorize an inquiry into a matter of boundary." *U. S. v. Halleck*, 1 Wall. 439. Obscurity in a grant may be explained by an official survey referred to in the grant. *U. S. v. McMasters*, 4 Wall. 680. A grant issued and then recalled on the application of the grantee, for the purpose of correcting the quantity of land granted, is in legal effect re-executed by such redelivery. *Malarin v. U. S.*, 1 Wall. 282, 289. "The Supreme Court will decline to instruct an inferior court relative to the location and survey of a grant, when these questions were not decided by the lower court, as it is presumed to act in accordance with established rules." *U. S. v. Heirs of Berreyesa*, 23 How. 499. In ejectment proceedings, an unconfirmed grant cannot prevail against a confirmed one. *Singleton v. Touchard*, 1 Black. 342. "A third party cannot in ejectment proceedings raise the question of fraud in a grant from the sovereign or proper legislative authority." *Field v. Seabury*, 19 How. 823. "A bill in equity lies

other surveys provided for in this act are made by the officers of the General Land Office, over which surveys this court has only a revisionary power.

§ 466. *Evidence.—Public Records.*—Upon the application of any party in interest, or of the attorney of the United States, the Commissioner of the General Land Office, the Surveyor-General, or the keepers of any public records are required to transmit to this court any records and papers which they may have in their possession relating to the land grants or claims of which the court has jurisdiction.<sup>1</sup> Such officers may also be required by the court to attend in person or by deputy any session of the court, and produce such records and papers as above required.<sup>2</sup> “Testimony which has heretofore been lawfully and regularly received by the Surveyor-General of the proper Territory or State, or by the Commissioner of

to set aside letters-patent obtained by fraud, but only between the sovereignty making the grant and the grantees. Such patent or grant cannot be collaterally avoided at law for fraud.” *Field v. Seabury*, 19 How. 323. Unless the fraudulent character of a grant is in issue in a lower court, it cannot be raised in the Supreme Court. *U. S. v. Larkin*, 18 How. 557. The Supreme Court will not interfere with a decision of the lower court for the reason that the evidence as to the boundaries of the grant is irreconcilable. *Alviso v. U. S.*, 8 Wall. 337.

Proceedings by inferior tribunals cannot be collaterally assailed, when they have jurisdiction, for mere error or irregularity. *Beard v. Federy*, 3 Wall. 478; *Lynch v. Bernal*, 9 Wall. 315. The Supreme Court might modify the decree of the lower court so as to confirm the claim, the same as if it had been presented by the original claimant or his legal representative. *U. S. v. Wilson*, 1 Black, 267. A motion to change a decree could not be heard by the Supreme Court on affidavits showing facts not of record. *U. S. v. Knight's Adm'r*,

1 Black, 488. The survey must reasonably conform to the decree, or it will not be sustained. *U. S. v. Halleck*, 1 Wall. 439; *Fossat Case*, 2 Wall. 649; *Castro v. Hendricks*, 23 How. 438. The survey must reasonably conform to the grant, or it will not be sustained. *Castro v. Hendricks*, 23 How. 438. See also *U. S. v. Seton*, 10 Pet. 390; *Snyder v. Sickles*, 98 U. S. 208. The record of juridical possession, which is essential to invest title after the grant, and the measurement recorded, control the United States in a survey of the grant. *Malarin v. U. S.*, 1 Wall. 282; *Graham v. U. S.*, 4 Wall. 259; *Van Reynegan v. Bolton*, 5 Otto, 33; *U. S. v. Pico*, 5 Wall. 536. “Where the plaintiffs in ejectment showed a legal title to land in California under a patent from the United States, and the survey under their authority, it was proper in the court below to refuse to admit testimony offered by the defendant to show that the survey was incorrect, the defendants claiming under a merely equitable title.” *Greer v. Mezes*, 24 How. 268.

§ 466. <sup>1</sup> 26 St. at L. 854, § 4.

<sup>2</sup> 26 St. at L. 854, § 4.

the General Land Office, upon any claims presented to them, respectively, shall be admitted in evidence in all trials under this act when the person testifying is dead," and the court is required to determine its competency and to give it such weight as it ought to have.<sup>3</sup>

These records and this testimony are very voluminous, and in addition to the powers of the court for taking testimony in open court and by deposition, provide the court with ample means for determining these cases.

*Depositions.*—The Rules of Practice provide that the testimony of witnesses shall be taken in open court, unless for some reason they are unable to attend, and in that case, upon the application of the party desiring the testimony, the judge may make an order allowing the deposition of such witnesses to be taken,<sup>4</sup> if it appears to him proper; but such order shall not be granted unless the person applying for it gives notice to the adverse attorney of record of the time and place of making such application, at least five days before it is made to the court, stating the name and residence of the witness whose deposition is desired.<sup>5</sup> The *application* shall state the name and residence of each witness whose deposition is desired, and what is expected to be proven by each, together with the reasons why such witness should not be required to attend and testify, and the same shall be verified by the oath of some party in interest or an attorney of record in the cause." When the court or judge grants such application, the times and places of taking such depositions must be stated in the order. The *commission* to take depositions "may be directed to a commissioner of any Circuit Court of the United States, or to any other person qualified to take testimony by the laws of the State or Territory" in which the testimony is to be taken. The commission must name the person to whom it is directed and the place of his residence, so that he may be easily found. A certificate of the official character and authority of any officer to whom a commission may be directed must be returned with it. "The manner of certifying and returning depositions shall be as provided in the laws of the State or Territory where taken."<sup>6</sup> Five days' notice must be given to the

<sup>3</sup> 26 St. at L. 854, § 5.

<sup>5</sup> Rule 4.

<sup>4</sup> 26 St. at L. 854, ch. 539, § 1.

<sup>6</sup> Rule 5.

opposite party of an application to the clerk to open and *file depositions* returned into court. In the absence of written objection within this time, the depositions may be published as of course. Objections made as aforesaid shall be heard by a judge of the court on like notice.<sup>7</sup> The claimant must establish his claim by a preponderance of evidence.<sup>8</sup>

<sup>7</sup> Rule 6.

<sup>8</sup> U. S. v. Elder, 177 U. S. 104; U. S. v. Ortiz, 176 U. S. 422.

The following decisions have been made under other acts: A presumption in favor of the power of officers to make a grant exists when the proper documents are shown. If power is denied, the burden of proof rests on the person questioning it. U. S. v. Peralta, 19 How. 343. Record evidence of the title must be shown, or its absence explained to the satisfaction of the court. U. S. v. Sutter, 21 How. 170; U. S. v. Teschmaker, 22 How. 392; Fuentes v. U. S., 22 How. 443; U. S. v. Chana, 24 How. 181; U. S. v. Osio, 23 How. 278; U. S. v. Knight's Adm'r, 1 Black, 227; White v. U. S., 1 Wall. 660; Romero v. U. S., 1 Wall. 721; Peralta v. U. S., 8 Wall. 434; Pinkerton v. Ledoux, 129 U. S. 346. A grant must have been deposited and recorded in the proper office, and be a part of the public archives of Mexico, to be sustained. U. S. v. Berreyesa's Heirs, 23 How. 499; Palmer v. U. S., 24 How. 125; U. S. v. Cambuston, 20 How. 59; U. S. v. Castro, 24 How. 346; Peralta v. U. S., 8 Wall. 434. Oral evidence is admitted to identify land as that included in a land grant or a survey. Doolan v. Carr, 125 U. S. 618. A testimonio of a Mexican title is not void because it is not stamped, but its execution must then be proved. Gonzales v. Ross, 120 U. S. 605. Proof of the genuineness of the signatures to the grant is not sufficient to sustain it. U. S. v. Teschmaker, 22 How. 392; U. S. v. Moreno, 1 Wall. 400; U. S. v. Osio, 23

How. 278. Nor of possession. U. S. v. Chaboya, 2 Black, 593. But possession must always be shown. Hornsby v. U. S., 10 Wall. 224. A recital in the grant that all the prerequisites had been complied with is not sufficient to raise a presumption to that effect. Fuentes v. U. S., 22 How. 443. Parol evidence may be received when questions of priorities of equities arise. Berthold v. McDonald, 22 How. 334. Proof that the archives were destroyed is not sufficient from the holder of a naked title, unless he shows specifically that the papers that were necessary to complete his title were lost, and had been of record. U. S. v. Sutter, 21 How. 170; U. S. v. Castro, 24 How. 346; U. S. v. Neleigh, 1 Black, 298; U. S. v. Knight's Adm'r, 1 Black, 227.

The claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copies he produced were given to the grantee before he could be heard to prove their loss and their contents. U. S. v. Bolton, 23 How. 341. Secondary evidence is worthless unless the legality of the grant is first shown, and also that it was of record. U. S. v. Castro, 24 How. 346; U. S. v. Knight's Adm'r, 1 Black, 227; U. S. v. Vallejo, 1 Black, 541 and 283; Pico v. U. S., 2 Wall. 279; Peralta v. U. S., 8 Wall. 434; Hornsby v. U. S., 10 Wall. 224. An unrecorded grant is inconsistent with the established practice of governments. U. S. v. Vallejo, 1 Black, 541 and 283. Mexican officers will not be heard to contradict or supply records. U. S. v. Neleigh, 1 Black,

**§ 467. Attorneys and clerks.**—“The clerk shall keep a roll of attorneys. An attorney who is a member of the Supreme Court of the United States, or of any Circuit Court of the United States, or of the highest court of the State or Territory in which he resides, shall, upon exhibiting his certificate of admission to the clerk, be entitled to have his name entered upon the roll of attorneys, and to appear in any cause pending before the court.”<sup>1</sup>

The clerk is the custodian of the records of the court, and he must keep at each place where regular terms of the court are held, (1) a journal for recording all orders, decrees, and judgments of the court; (2) an appearance docket for recording the title of all actions brought in the court at that place, and for noting the filing of the petition, and any subsequent pleadings, with a reference showing the journal page of all or-

298; *U. S. v. Knight's Adm'r*, 1 Black, 227. Records are *prima facie* evidence of the contents of the original documents, when made by the proper person, and in the absence of any just ground of suspicion as to their genuineness. *U. S. v. Neleigh*, 1 Black, 298; *U. S. v. Watkins*, 97 U. S. 219. Maps are not necessary to establish the validity of a grant, although usually expected. *U. S. v. Sutherland*, 19 How. 363; *Hornsby v. U. S.*, 10 Wall. 224. A map accompanying the petition and referred to in the patent may decide the location of the land. *U. S. v. Larkin*, 18 How. 557. Where fraud is charged, the evidence in support of the charge should appear on the record. *U. S. v. Johnson*, 1 Wall. 326; *U. S. v. Auguisola*, 1 Wall. 352.

A formal delivery of possession, “juridical possession,” is essential under Mexican law to invest title. It involved a measurement of the land and the location of its boundaries, in cases of uncertainty. The record of such proceedings control the United States in confirming a grant. *Graham v. U. S.*, 4 Wall. 259. Every step necessary under the Mex-

ican law of 1824 and the Regulations of 1828 must be shown to have been taken by proper evidence. *Miller v. Dale*, 92 U. S. 473; *Adam v. Norris*, 103 U. S. 591. A patent confirming a grant is, like a quitclaim, conclusive only between the parties as to the validity of the grant. *Miller v. Dale*, 92 U. S. 473; *Adam v. Norris*, 103 U. S. 591; *Beard v. Federy*, 8 Wall. 478. But see *Mora v. Nunez*, 10 Fed. R. 634. A patent issued upon confirmation of a grant is conclusive evidence of its validity and correct location against one having no patent. *Mora v. Nunez*, 10 Fed. R. 634. Evidence that a governor refused to grant a tract because claimed by others cannot operate to give title by estoppel. *Arguello v. U. S.*, 18 How. 539, 545. Congressional confirmations are a bar to any proceedings in the courts. *U. S. v. Covilland*, 1 Black, 339. Objections to the sufficiency of the proof cannot be raised for the first time in the Supreme Court, but must be taken in the court below. *U. S. v. Auguisola*, 1 Wall. 352. So also the question of fraud. *U. S. v. Larkin*, 18 How. 557.

§ 467. <sup>1</sup> Rules of Practice, Rule 1.

ders and entries made in the progress of the cause; and (3) a book for the use of the court at each term, for entering each cause then pending at that place, in which the court may enter the memoranda of its orders and judgments.<sup>2</sup>

§ 468. **Limitation of proceedings.**—All claims that “have not been confirmed by act of Congress, or otherwise lawfully decided upon by lawful authority, and which are not already complete and perfect,” of which this court has jurisdiction, are forever barred if not presented by petition within two years “from the taking effect of this act.”<sup>1</sup> But it is the duty of the court to appoint a guardian *ad litem*, and if necessary counsel, to protect the rights of minors, married women, and persons *non compos mentis*, in any land claim before this court whenever such cases come to the knowledge of the court.<sup>2</sup>

§ 469. **Decrees.**—The decrees of this court must determine:

1. The validity of the title to the land claimed.
2. The boundaries of the grant presented for adjudication, according to the law of nations, the stipulations of the treaties of 1848 and 1853, between the United States and Mexico, and the laws and ordinances of the government from which the claim was derived.

3. “And all other questions properly arising between the claimants or other parties in the case and the United States.”

This decree must refer “to the treaty, law, or ordinance under which such claim is confirmed or rejected,” and if confirmed the decree must contain a clear statement of the location, boundaries, and area of the land the claim to which is confirmed by the decree.<sup>1</sup> But no decree can “be entered otherwise than upon full legal proof and hearing.”<sup>2</sup> The court may render a judgment against the United States for the value of the lands claimed not exceeding \$1.25 per acre, if it is found that any portions of the lands decreed by this court to a claimant have been previously disposed of by the United States, upon proof of such disposal and the value of the land. From such a judgment an appeal may be taken as in other cases.<sup>3</sup>

<sup>2</sup> Rules of Practice, Rule 1.

§ 468. <sup>1</sup> 26 St. at L. 854, ch. 589, § 12;  
Beard v. Federy, 8 Wall. 478.

<sup>2</sup> 26 St. at L. 854, § 12.

§ 469. <sup>1</sup> 26 St. at L. 854, § 7.

<sup>2</sup> 26 St. at L. 854, § 6.

<sup>3</sup> 26 St. at L. 854, § 14.



The Act provides:

"*Fifth.* No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act has not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands.

"*Sixth.* No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grants, claims, or lands, or their disposition, otherwise than as is in this act provided.

"*Seventh.* No confirmation in respect of any claims or lands mentioned in section six of this act or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty to the United States as referred to in this act, shall in any case be made, or patent issued for a greater quantity than eleven square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim.

"*Eighth.* No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land."<sup>4</sup>

<sup>4</sup> 26 St. at L. 854, ch. 539, § 13.

Under former acts it was held as follows: Decrees of the Commissioners and District Court of California were construed under common-law rules. *Higuera v. U. S.*, 5 Wall. 827. A decree may refer to other documents for a more detailed description, *U. S. v. Halleck*, 1 Wall. 439; or to another petition, *U. S. v. Knight's Adm'r*, 1 Black, 227; but such documents will not control the

language of the decree if unambiguous. *U. S. v. Knight's Adm'r*, 1 Black, 227. A decree takes effect by relation as of the day when presented to the commissioners. *Grisar v. McDowell*, 6 Wall. 863. A decree operates to the benefit of the grantee as well as to the original holder. *Steinbach v. Stewart*, 11 Wall. 566. A decree cannot be collaterally assailed on any point which might have been corrected by an appeal.

**§ 470. Preparation for appeals.**— Practice after the decree is rendered to determine whether the United States shall take an appeal or not is determined by section nine of the act. In every case where a claim is confirmed by this court, the attorney for the United States is required to submit to the Attorney-General within sixty days next after the rendition of the judgment, a statement of the case and the points decided by the court, verified by the certificate of the presiding judge. If this statement is not submitted within the time mentioned, the United States continues to have a right of appeal “until six months next after the receipt of such statement.” The Attorney-General may require the clerk of the court to transmit the record of any case in which final judgment has been rendered, for his examination, and it is his duty to instruct the attorney for the United States whether to take an appeal or not.<sup>1</sup>

**§ 471. Practice when no appeal is taken.**— It is the duty of the clerk of the court to certify to the Commissioner of the General Land Office final decisions, with a copy of the decree of confirmation. The commissioner then, by the Surveyor-General of the State or Territory in which the land lies, surveys the tract confirmed, at the expense of the United States. It is then the duty of the Surveyor-General, upon the return of the survey and the plat thereof to his office, to give notice of this survey by publication in Spanish and English once a week for

U. S. v. Halleck, 1 Wall. 439; Lynch v. Bernal, 9 Wall. 815. A decree of confirmation on which an appeal is pending will not prevail in ejectment against a legal title under a patent. Greer v. Mezes, 24 How. 268; Singleton v. Touchard, 1 Black, 342. A decree obtained by fraud is sufficient to sustain an appeal if correct in form. U. S. v. Gomez, 8 Wall. 752. A decree directing the issuance of a second patent for a part of land previously granted is a nullity. U. S. v. Covilland, 1 Black, 339. The decree must control the survey. Castro v. Hendricks, 23 How. 438; U. S. v. Halleck, 1 Wall. 439; Fossat Case, 2 Wall. 649. A decree of the District Court may be amended,

on motion, by the Supreme Court. U. S. v. Morant, 124 U. S. 647. A confirmer takes only a legal title, and those having equitable rights to the land under the title confirmed may go into equity to have their rights determined. Carpentier v. Montgomery, 13 Wall. 480. “A confirmation of a Mexican land title in a proceeding conducted in the name of the original grantee is binding upon the United States, and upon all assignees of the original grantee.” U. S. v. Covilland, 1 Black, 339. Confirmation will be refused when there is fraud or forgery. Luco v. U. S., 23 How. 515.

§ 470. <sup>1</sup> 26 St. at L. 854, § 9.

four consecutive weeks in two newspapers, one published at the capital of the State or Territory, and the other near the land surveyed. This survey and plat must be open for public inspection for ninety days after the first publication of the above notice, at the office of the Surveyor-General. If at the expiration of this time no objection to the survey has been filed, the Surveyor-General approves it, and forwards it to the Commissioner of the General Land Office, whose duty it is to transmit the survey with all the accompanying papers to the court which made the final decision. The court after an examination of these papers must determine whether the survey is in accordance with its decree of confirmation, and, if so, the court directs its clerk to indorse its approval upon the face of the plat. If the survey is incorrect, the court returns it directing in what particulars it shall be corrected. When the survey is finally approved it is forwarded to the Commissioner of the General Land Office to issue a patent thereon to the conferee in accordance with the decree and survey.<sup>1</sup>

Any party in interest may, during the ninety days that the survey and plat are at the office of the Surveyor-General, file his written objections thereto, stating "distinctly the interest of the objector and the grounds of his objection, and signed by him or his attorney," accompanied by such affidavits or proofs in support of his objections as he may produce, which objections and proof are forwarded with the survey without the approval of the Surveyor-General, to be transmitted, by the Commissioner of the General Land Office, with the other papers relating to the survey, to the court in which the final decision was made, for its consideration and determination, in the same manner as if no objections had been filed.<sup>2</sup>

Although the United States in the first instance pays the cost of the survey, it is provided that one-half of this expense shall be paid by the claimant, and this is a lien on the land until paid. If payment is not made within six months after the approval of the survey, enough of the land may be sold to satisfy the lien, and until this payment is made no patent shall be issued for the land.<sup>3</sup>

§ 471. <sup>1</sup> 26 St. at L. 854, ch. 539, § 10.      <sup>2</sup> 28 St. at L. 854, § 10.

<sup>3</sup> 26 St. at L. 854, § 10.

§ 472. Appeals.— Either party dissatisfied with a decision of this court has the right of appeal to the Supreme Court of the United States.<sup>1</sup> This appeal must be taken within six months of the date of the decision, and in accordance with the practice of taking appeals from decisions of the Circuit Courts of the United States, except that the limitation in respect to the amount in controversy is removed.<sup>2</sup> In the absence of an appeal taken as provided in this act, the decree of this court is final and conclusive.<sup>3</sup> When an appeal is taken from the decision of this private land court, the Supreme Court retries the whole case, the issues of fact as well as of law.<sup>4</sup> It may cause testimony to be taken in addition to that given in the court below; it may amend the record of the proceedings below; and on such retrial and hearing every question is open for its investigation and determination, and its decision is final and conclusive of all the questions involved.<sup>5</sup>

§ 472. 126 St. at L. 854, §§ 9, 14. This part of the statute is constitutional. *U. S. v. Coe*, 155 U. S. 76.

<sup>2</sup> 26 St. at L. 854, § 14; *U. S. v. Pena*, 175 U. S. 500.

<sup>3</sup> 26 St. at L. 854, § 9.

<sup>4</sup> 26 St. at L. 854, § 9.

<sup>5</sup> 26 St. at L. 854, § 9. This section of the statute is permissive and not mandatory. *U. S. v. Coe*, 155 U. S. 76. The United States can appeal even where it has no interest in the result of the litigation. *U. S. v. Conway*, 175 U. S. 60, 69.

Under former acts decisions as to appeals were as follows: Under the act of 1851 the Supreme Court had appellate jurisdiction over the California Land Commissioners and the District Courts. *U. S. v. Castellero*, 2 Black, 17. Appeals under the act of 1851 were subject to the regular judiciary acts of 1789 and 1803, and were to be prosecuted to the first succeeding term after their allowance. *Castro v. U. S.*, 3 Wall. 46; *Mesa v. U. S.*, 2 Black, 721. In the absence of an appeal the decision of the District Court of California was final between the United States and

claimants. *Higuera v. U. S.*, 5 Wall. 827. When the validity of a grant is affirmed, and an appeal is taken by the claimant alone, to modify the decree as to quantity, the validity of the grant is not open to review. *Malarin v. U. S.*, 1 Wall. 282. An appeal must be prosecuted in the manner and within the time directed by Congress, and if not, it will be dismissed. *Mesa v. U. S.*, 2 Black, 721. Where the act directs that a notice of intention to appeal shall be filed within six months, it must be complied with strictly. Such direction is mandatory, and leaves the court no discretion, as in the case of its own rule. *Yturvide's Ex'rs v. U. S.*, 22 How. 290. A citation of the adverse party, with due return or waiver, by general appearance or otherwise, is indispensable to jurisdiction on appeal. *Alviso v. U. S.*, 5 Wall. 824. Appeals from decrees of confirmation should not come up as on bills of exceptions to evidence, but objections should be taken in the court below to the sufficiency of proof of execution. *U. S. v. Johnson*, 1 Wall. 326; *U. S. v. Yorba*, 1 Wall. 412; *U. S. v.*

Auguisola, 1 Wall. 352. An appeal to the District Court of California from the commissioners was an original proceeding which opened the whole case. *U. S. v. Ritchie*, 17 How. 525; *Grisar v. McDowell*, 6 Wall. 363. An appeal from the District Court to the Supreme Court suspends the operation and effect of the decree, only when by a judgment of the Supreme Court the claim of the conferee might be defeated. *Grisar v. McDowell*, 6 Wall. 363. The United States cannot object to the correctness of a boundary line in an approved survey where it has not appealed from the approving decree. *Alviso v. U. S.*, 8 Wall. 337.

An erroneous decree as to title or boundaries can only be corrected by an appeal. *U. S. v. Billing*, 2 Wall. 444. There is no appeal from any order or decision of the lower court which is not final. *U. S. v. Fossatt*, 21 How. 445. In the absence of specific regulations, appeals are subject to the Rule 63 of the Supreme Court. *U. S. v. Pacheco*, 20 How. 261. Where a petition for an appeal is improperly denied, a mandamus is the proper remedy. *U. S. v. Gomez*, 3 Wall. 752. See *supra*, §§ 363, 364. A notice of appeal was necessary. *Beard v. Federy*, 3 Wall. 478. An appeal from a decision by the United States Circuit Court to the Supreme Court was allowed when the Circuit Court had improperly assumed jurisdiction, as the appeal should have been from the District Court directly to the Supreme Court. *U. S. v. Circuit Judges*, 3 Wall. 673. Proceedings on appeal are subject to exceptions. *U. S. v. Gomez*, 3 Wall. 752.

Parties who have not appeared below cannot be heard for the first time in the Supreme Court in opposition to a survey. *U. S. v. Estudillo*, 1 Wall. 710. Intervenor who are parties to the record may be heard on appeal. *U. S. v. Fossatt*, 20 How. 413; *U. S. v. White*, 23 How. 249; *U. S. v. Estudillo*, 1 Wall. 710. A dismissal will not be vacated upon the application of parties not of record. *U. S. v. Estudillo*, 1 Wall. 710. The Supreme Court may remand a case where the jurisdiction is not apparent, and for the purpose of correcting any necessary matter of form or substance. *Cervantes v. U. S.*, 16 How. 619; *U. S. v. White*, 23 How. 249. An appeal will be dismissed when the United States is not a party in interest, *U. S. v. White*, 23 How. 249; or when not taken in accordance with the act. *U. S. v. Morillo*, 1 Wall. 706. Want of jurisdiction may be reviewed by Supreme Court on appeal. *Yturvide's Ex'rs v. U. S.*, 22 How. 290. The court may set aside and annul, or correct and modify a survey, and to such order and decree the parties may except and appeal therefrom. Such appeal, however, does not open the decree of confirmation, as upon that the survey is based. *Maguire v. Tyler*, 8 Wall. 650. An appeal may be taken from a decree annulling, correcting, or modifying a survey. *Higueras v. U. S.*, 5 Wall. 827. The decree of the District Court on a survey was final unless an appeal was taken, *U. S. v. Billing*, 2 Wall. 444, and conclusive on title and boundary. *U. S. v. Halleck*, 1 Wall. 439; *Lynch v. Bernal*, 9 Wall. 315.

## CHAPTER XXXIII.

### BANKRUPTCY.

§ 474. Courts of bankruptcy and their jurisdiction.—Original jurisdiction in bankruptcy is vested in the District Courts of the United States in the several States,<sup>1</sup> the Supreme Court of the District of Columbia,<sup>2</sup> the District Courts of the several Territories,<sup>3</sup> the United States Courts in the Indian Territory and the District of Alaska,<sup>4</sup> the District Court of Porto Rico,<sup>5</sup> and the District Court of Hawaii;<sup>6</sup> all of which are courts of bankruptcy.<sup>7</sup> The Bankruptcy Act expressly invests them, “within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and

§ 474. <sup>1</sup> 30 St. at L. 544, 545, § 2.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> 31 St. at L. 84.

<sup>6</sup> 31 St. at L. 158.

<sup>7</sup> 30 St. at L. 544, 545, § 2.



punish bankrupts, officers, and other persons and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;

and (19) transfer cases to other courts of bankruptcy. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.”<sup>8</sup>

The Act further provides that: “In the event petitions are filed against the same person, or against different members of a partnership in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of the parties in interest.”<sup>9</sup> The General Orders provide that: “In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the

<sup>8</sup> 80 St. at L. 544, 545, 546, § 2.

<sup>9</sup> 30 St. at L. 544, 554, § 82. Where the debts were all contracted in one district in which the business of the bankrupt obliged him to spend a portion of his time, it was held that it would be “for the greatest convenience of the parties in interest” to proceed there, even if the bank-

rupt resided elsewhere. In *re Waxelbaum*, 98 Fed. R. 589. It was held further that this section and G. O. vi applied not only to a case where two or more involuntary petitions were filed, but also to a case where an involuntary petition was filed in one district and a voluntary one in another. *Ibid.*

same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.”<sup>10</sup> It has been held that where a petitioner in involuntary bankruptcy resided at one district, where he was employed as clerk in a store, but was engaged in trade on his own account as a general merchant in another district, the court of the latter district had jurisdiction of the petition;<sup>11</sup> that where a corporation closed its manufacturing works in one district five months before the petition was filed, discharging all its employees there except a watchman and a local superintendent who were kept to preserve the property, and in the intervening time carried on a liquidation of its affairs in its general office in another district where its principal officers lived, its directors’ meetings were held, its books kept, its banking business transacted and its principal purchases and sales made, the court of the latter district had jurisdiction;<sup>12</sup> that where the only business transacted by a partnership for more than three months before the petition was filed was a winding up of its affairs within the district, the court had jurisdiction;<sup>13</sup> that where the debtor had lived abroad during the greater part of the preceding six months, but had not abandoned his original domicile, the court had jurisdiction where his original domicile was situated;<sup>14</sup> but where the bankrupt lived without the district, and had a principal place of business within it until four months before the petition was filed, when she ceased doing business, that the court had no jurisdiction.<sup>15</sup> A creditor, who has proved and filed his claim, participated in the election of a trustee and received a dividend, cannot object to the discharge upon the ground that the proceeding was instituted in the wrong district.<sup>16</sup> It seems that creditors waive such an objection unless they make it promptly by a motion to dismiss the petition or to vacate the adjudication in bankruptcy.<sup>17</sup>

<sup>10</sup> G. O. vi.

<sup>11</sup> In re Brice, 98 Fed. R. 942.

<sup>12</sup> In re Marine Mach. & C. Co., 91 Fed. R. 630.

<sup>13</sup> In re Blair, 99 Fed. R. 76.

<sup>14</sup> In re Williams, 99 Fed. R. 544.

<sup>15</sup> In re Plotke (C. C. A.), 104 Fed. R. 964.

<sup>16</sup> In re Mason, 99 Fed. R. 256.

<sup>17</sup> In re Mason, 99 Fed. R. 256; Allen v. Thompson, 10 Fed. R. 116.

A later section of the statute provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."<sup>18</sup> A District Court has jurisdiction to enjoin any suit or proceeding in the State court, whether by replevin<sup>19</sup> or sequestration,<sup>20</sup> instituted after the adjudication in bankruptcy and the appointment of a referee; but has no jurisdiction of an action of replevin<sup>21</sup> or to set aside for fraud a transfer of property in the possession of a third person before the adjudication in bankruptcy,<sup>22</sup> or to collect debts due the bankrupt,<sup>23</sup> unless the defendant consents to the jurisdiction, when the District Court will entertain such a suit.<sup>24</sup> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be fol-

<sup>18</sup> 30 St. at L. 544, 552, § 23.

<sup>19</sup> *White v. Schloerb*, 178 U. S. 542.

<sup>20</sup> *In re Whitener* (C. C. A.), 105 Fed. R. 180.

<sup>21</sup> *Mitchell v. McClure*, 178 U. S. 539.

<sup>22</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524; *Wall v. Cox*, 181 U. S. 244; *In re Sheinbaum*, 107 Fed. R. 247. But see *In re Lewin*, 103 Fed. R. 850.

<sup>23</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 538.

<sup>24</sup> *Hicks v. Knost*, 178 U. S. 541; *Bardes v. Hawarden Bank*, 178 U. S. 524, 539. But see *Sinsheimer v. Simonson* (C. C. A.), 107 Fed. R. 898.

As to what constitutes consent, see *Bryan v. Bernheimer*, 181 U. S. 188; *In re Riker*, 107 Fed. R. 96; *Boonville Nat. Bank v. Blakey* (C. C. A.), 107 Fed. R. 891; *Fisher v. Cushman* (C. C. A.), 103 Fed. R. 860; *In re Steuer*, 104 Fed. R. 976.

It has been held that a District Court may, by summary proceedings upon notice, order the delivery to a trustee in bankruptcy of property of the bankrupt held by an assignee in insolvency, *In re Stokes*, 106 Fed. R.

812; but see *Smith v. Belford* (C. C. A.), 106 Fed. R. 658; by a State sheriff, *In re Kenney* (C. C. A.), 105 Fed. R. 897; or by a stranger who claims no right adverse to the bankrupt in the same. *In re Moore*, 104 Fed. R. 869. *Contra*, *In re Nugent* (C. C. A.), 105 Fed. R. 581. But that it has no jurisdiction, without consent, of a plenary suit by the holders of notes with a waiver of exemptions to reach and subject to their claims property of the bankrupt claimed by him to be exempt. *Woodruff v. Cheeves* (C. C. A.), 105 Fed. R. 601. Nor of a petition by the trustee to enforce the sale of collateral securities. *In re Silberhorn*, 105 Fed. R. 899. Nor of an application for an injunction against the disposition, by a third person, of property claimed to belong to the bankrupt. *In re Ward*, 104 Fed. R. 985. Nor of a suit in equity by the bankrupt to enjoin the enforcement of a decree for a sale of his property rendered by a State court in a suit to set aside a fraudulent conveyance which was commenced more than four

lowed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."<sup>25</sup>

**§ 475. Parties in bankruptcy.**—Proceedings in bankruptcy are either voluntary or involuntary. It has been said that when a petition is filed by some of the members of a partnership in which others do not join, the proceeding is in its inception voluntary; and it so remains unless the others contest the adjudication, when it becomes, as to the dissenters, involuntary.<sup>1</sup> Where a partner files a petition in bankruptcy alleging that another member, whom he makes a party, has refused to join, and praying that they both be adjudged bankrupts; and afterwards the other partner comes in, confesses himself a bankrupt and is so adjudged, it is a case of involuntary bankruptcy.<sup>2</sup> Petitions of voluntary bankruptcy may be filed by "any person who owes debts except a corporation."<sup>3</sup> A resident alien may file the petition.<sup>4</sup>

months before the bankruptcy proceedings. *Pickens v. Dent* (C. C. A.), 106 Fed. R. 653.

It seems that a District Court has jurisdiction to entertain proceedings to take possession of property of the bankrupt conveyed by a voluntary insolvent assignment within three months before the adjudication of bankruptcy and sold by the assignee thereafter and before the election of a trustee. To such a proceeding the court may make the assignee a party and dispose of the equities between him and his vendee. *Bryan v. Bernheimer*, 181 U. S. 188, 198.

<sup>25</sup> G. O. xxxvii.

§ 475. <sup>1</sup> *In re Murray*, 96 Fed. R. 600.

<sup>2</sup> *Metsker v. Bonebrake*, 103 U. S. 66; *In re Murray*, 96 Fed. R. 600.

<sup>3</sup> 30 St. at L. 544, 547, § 4.

<sup>4</sup> *In re Boynton*, 10 Fed. R. 277. *Brandenburg on Bankruptcy* (2d ed.),

78, citing *In re Kaiy Chung*, 1 N. B. N. 22. *In re Brice*, 93 Fed. R. 942, holds that a minor may become a voluntary bankrupt. *In re Duguid*, 100 Fed. R. 274, where the petition was filed by the infant's mother, who was his partner, says the contrary. An infant cannot be made an involuntary bankrupt. *In re Dunnigan*, 95 Fed. R. 428; *In re Eidemiller*, 105 Fed. R. 595. *In re Funk*, 101 Fed. R. 244, holds that a person who has been adjudged a lunatic cannot be made an involuntary bankrupt for an act committed after he became insane, and says that a man who has been adjudged a lunatic cannot be made a bankrupt; citing on the former point *In re Marvin*, 1 Dill. 178. *In re Burka*, 107 Fed. R. 674: Where no committee or guardian had been appointed to care for the property of a man who had been adjudged a luna-

Petitions for involuntary bankruptcy may be filed against any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, private bankers, but not national banks nor banks incorporated under the State or Territorial laws, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of \$1,000 or over.<sup>5</sup> "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt,"<sup>6</sup> in either voluntary<sup>7</sup> or involuntary proceedings.<sup>8</sup>

tic, and the acts of bankruptcy had been committed before the insanity, the court held that it would be premature to determine, before the appointment of a guardian *ad litem*, whether the lunatic could be adjudged an involuntary bankrupt. A guardian *ad litem* was appointed accordingly.

<sup>5</sup> 80 St. at L. 544, 547, § 4. A person engaged in raising hogs or cattle for sale is engaged in farming within the meaning of the statute. *In re Thompson*, 102 Fed. R. 287. See *In re Taylor (C. C. A.)*, 102 Fed. R. 728. The statute does not protect a man who engages in farming after the abandonment of a business in which he had committed an act of bankruptcy. *In re Luckhardt*, 101 Fed. R. 807. An association claiming to act as a corporation, but which has not been legally incorporated, can be forced into involuntary bankruptcy. *Davis v. Stevens*, 104 Fed. R. 235. It has been held: that a corporation which maintains a private hospital where patients are treated with an antiseptic vapor prepared on the premises can be declared a bankrupt. *In re San Gabriel Sanitarium*, 95 Fed. R. 271. That involuntary bankruptcy cannot be adjudicated against a corporation engaged solely in giving theatrical performances, *In re Oriental Society*, 104 Fed. R. 975; a water company supplying

water for municipal and domestic use in return for fixed rentals, *In re N. Y. & W. Water Co.*, 98 Fed. R. 711; and an incorporated mutual fire insurance company which pays losses out of the proceeds of assessments on its members. *In re Cameron Town M. Fire, L. & Windstorm Ins. Co.*, 96 Fed. R. 756. As to a corporation which issues policies of insurance for the profit of its stockholders, see *In re Merchants' Ins. Co.*, 8 Biss. 162. Nor a mining company, although it sells the products of its mines. *In re Elk Park Min. & Mill Co.*, 101 Fed. R. 422; *In re Rollins Gold & S. Min. Co.*, 102 Fed. R. 982; *In re Chicago-Joplin Lead & Zinc Co.*, 104 Fed. R. 67; *In re Woodside Coal Co.*, 105 Fed. R. 56.

<sup>6</sup> 80 St. at L. 544, 547, § 5; *In re Levy*, 95 Fed. R. 812.

<sup>7</sup> *In re Hirsch*, 97 Fed. R. 571.

<sup>8</sup> *In re Meyer (C. C. A.)*, 98 Fed. R. 976; *Bank v. Meyer*, 92 Fed. R. 896; *Mather v. Coe*, 92 Fed. R. 333. "We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceedings irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."



“Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount, may file a petition to have him adjudged a bankrupt.”<sup>9</sup> It has been held that a man’s wife may join in the petition if she is otherwise qualified.<sup>10</sup> A creditor of a partnership can join in a petition for involuntary bankruptcy against one of the partners individually.<sup>11</sup> It has been held that by assenting to an insolvent assignment,<sup>12</sup> and by accepting dividends from

The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication. The section is silent respecting a discharge of the partners individually. It does not, by terms or by implication, preclude an adjudication of the individual partners as bankrupt in the partnership proceeding; and, if there is such an adjudication, there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to it under the act. But, as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding who have not committed, or been participants in committing, one of the enumerated acts.” Wallace, J., *In re Meyer* (C. C. A.), 98 Fed. R. 976, 979.

The death of one of the partners will not prevent the adjudication of the bankruptcy of the firm, provided, at least, that possession of assets can be obtained from his administrator without force. *In re Pierce*, 102 Fed. R. 977.

“The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and

individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.” 80 St. at L. 544, 548, § 5g. Where judgments against a firm, in favor of certain of its creditors, were bought up by one of the partners, who took assignments of the judgments to himself, it was held that he thereby became a creditor of each of his copartners for their respective shares of the money advanced by him in purchasing the judgments, and was entitled to prove a claim for such share against the individual estate of one of the copartners in bankruptcy. *In re Carmichael*, 96 Fed. R. 594.

A solvent partner upon the bankruptcy of his associate is a creditor to the extent of any balance that would be due him upon an accounting, and may prove such a claim. *In re Stevens*, 104 Fed. R. 323.

<sup>9</sup> 80 St. at L. 544, 561, § 5g. It has been held that a creditor whose claim is unliquidated and has not been reduced to judgment, *In re Brinckman*, 103 Fed. R. 965; and a creditor who has received a preference, which he does not surrender, cannot institute the proceedings. *In re Gillette*, 104 Fed. R. 760. But see *In re Miller*, 104 Fed. R. 764.

<sup>10</sup> *In re Novak*, 101 Fed. R. 800.

<sup>11</sup> *In re Mercur*, 95 Fed. R. 634.

<sup>12</sup> *In re Romanow*, 92 Fed. R. 510.

the assignee,<sup>13</sup> a creditor is estopped from filing a petition for an involuntary bankruptcy because of such an assignment.

After a petition in involuntary bankruptcy has been filed, other creditors may intervene and join in the petition,<sup>14</sup> even if the original petitioners have done nothing after the return of the subpoena indorsed "not found" and the period of four months since the commission of the acts of bankruptcy therein alleged has expired.<sup>15</sup> It has been held that when the petition alleges that a creditor has obtained an unlawful preference, he may be allowed to intervene and defend.<sup>16</sup> An intervention may be allowed to a person such as the trustee of another bankrupt who claims an interest in the assets;<sup>17</sup> but it has been held that unless he intervenes, a claimant to property held by the trustee cannot upon a motion, accompanied by a special appearance, have it returned to him;<sup>18</sup> and that the court can-

<sup>13</sup> *Simonson v. Sinsheimer* (C. C. A.), 95 Fed. R. 948. It has been held that creditors are not estopped by filing their claims with the assignee while in ignorance of facts tending to show that the assignment was fraudulent. *In re Curtis* (C. C. A.), 94 Fed. R. 630. Nor by their submission to the assignee, at his request, of an unverified statement of their claims. *Simonson v. Sinsheimer*, 100 Fed. R. 426. Nor by delaying the institution of proceedings in bankruptcy for about two months at the request of the defendant who represented that he was about to offer a composition to his creditors. *Ibid.* Nor by the endorsement of their attorneys under peculiar circumstances of the word "seen" upon an order of the State court for the sale of the property assigned. *Ibid.* Nor by selling goods to the assignee. *Ibid.*, 96 Fed. R. 579. Nor appearing in the State court for the purpose of preventing a distribution of the insolvent estate until the time arrived at which proceedings in bankruptcy could be instituted. *Leidigh Carriage Co. v. Stengel* (C. C. A.), 95 Fed. R. 637. Nor by attacking in a State court certain preferences in the as-

signment. *Ibid.* Nor by joining with the insolvent and his assignee in a petition to the State court for a decree authorizing the conveyance of land to the creditor in part payment of his claim on the promise that he should receive a bond to indemnify him in case he should be required to pay back for the benefit of other creditors part of the proceeds of the land, which bond was never given. *In re Curtis* (C. C. A.), 94 Fed. R. 630. Nor by prosecuting an action in the State court for the recovery of a debt. *In re Henderson*, 10 Fed. R. 385. Under the Act of 1867, it was held that a secured creditor by joining in a petition for involuntary bankruptcy represented himself to be unsecured and waived or abandoned his security. *In re Bear*, 5 Fed. R. 53.

<sup>14</sup> *In re John A. Etheridge Furniture Co.*, 92 Fed. R. 329. *Cf.* *Neustadter v. Chicago Dry Goods Co.*, 96 Fed. R. 830.

<sup>15</sup> *In re Stein* (C. C. A.), 105 Fed. R. 749.

<sup>16</sup> *Goldman v. Smith*, 93 Fed. R. 182.

<sup>17</sup> *Fisher v. Cushman* (C. C. A.), 103 Fed. R. 860.

<sup>18</sup> *In re Bender*, 106 Fed. R. 873.

not compel creditors to join in a petition,<sup>19</sup> and is not required to notify those who have not joined of a dismissal of the petition for an insufficiency of petitioners.<sup>20</sup>

“The death or insanity of the bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt’s residence.”<sup>21</sup>

§ 476. Acts of bankruptcy.—“(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

“(b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.

“(c) It shall be a complete defense to any proceedings in bank-

<sup>19</sup> In re Gillette, 104 Fed. R. 769.

<sup>20</sup> Ibid.

<sup>21</sup> 30 St. at L. 544, 549, § 8.

ruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision 1 the burden of proving solvency shall be on the alleged bankrupt.”<sup>1</sup>

(1) A fraudulent transfer, conveyance, concealment or removal of property is an act of bankruptcy, irrespective of the insolvency of its maker.<sup>2</sup> It was held under the bankruptcy act of 1867, that the intent specified in the statute means an actual design in the mind which must be proved as a question of fact;<sup>3</sup> that the intent must be determined by looking at what the debtor says and does, and the effect of the same;<sup>4</sup> that the fraud or innocence of the person to whom the transfer is made is immaterial;<sup>5</sup> that where the debtor gave a fictitious note and procured an attachment on the same for the purpose of preventing an attachment by an actual creditor, a fraud was committed although his real object was to use the money to pay other creditors;<sup>6</sup> that where an insolvent firm was dissolved and the assets transferred to one of the partners, who executed a mortgage upon the same to secure a separate debt, there was a conveyance to hinder and delay creditors;<sup>7</sup> but that a conveyance by a debtor whose property exceeded in value all that he owed, in consideration of an agreement that the grantee should pay his debts and support him during the residue of his days, was not *per se* fraudulent.<sup>8</sup> The present statute says that “‘concealed’ shall include secrete, falsify

§ 476. 180 St. at L. 544, 546, 547, § 8.

<sup>1</sup>In re Randall & Sunderland, Deady, 557; In re Nickodemus, 8 N. B. R. 230; West Co. v. Lea, 174 U. S. 590.

It has been held that concealment of property differs from a transfer of property, in that the latter is final and complete when once accomplished, while the former is continuous. So if an insolvent conceals his property with intent to hinder, delay or defraud his creditors, more than six months thereafter, while the concealment exists, his creditors may file a petition against the debtor.

Citizens' Bank of Salem v. De Pauw Co. (C. C. A.), 105 Fed. R. 926. See In re Mingo Val. Creamery Ass'n, 100 Fed. R. 182.

<sup>2</sup>In re Drummond, 1 N. B. R. 596; Perry v. Langley, 2 N. B. R. 231; In re Goldsmith, 3 N. B. R. 165.

<sup>3</sup>Ecfort v. Greeley, 6 N. B. R. 433.

<sup>4</sup>In re Drummond, 1 N. B. R. 596. So held under the present law. In re Rome Planing Mill, 96 Fed. R. 812.

<sup>5</sup>In re Williams & Co., 1 Lowell, 406.

<sup>6</sup>In re Waite, 1 Lowell, 207.

<sup>7</sup>In re Cornwall, 9 Blatchf. 114; s. c., 6 N. B. R. 305.

and mutilate," and "'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."<sup>9</sup> It has been held that permitting the appointment of a receiver of a corporation by a State court is not a transfer of property for the purpose of defrauding creditors.<sup>10</sup>

(2) "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."<sup>11</sup> It has been held that property which is exempt from execution is to be included in the computation.<sup>12</sup> The following acts have been held to be transfers with the intent to prefer creditors: a transfer in payment of a debt of personal property sufficient in value to satisfy it in full;<sup>13</sup> the conveyance to a creditor of personal property of greater value than the debt, the debtor receiving the difference in cash;<sup>14</sup> the transfer of a merchant's stock in trade to a creditor, part of the consideration being payment by a creditor to a bank to meet the debtor's overdrawn account there, for which the transferee was responsible;<sup>15</sup> and even the payment of a debt in money;<sup>16</sup> but not the sale of property to a person or creditor and the application of part of the proceeds to the defraying of liens upon the same, such as taxes and arrears of rent upon a leasehold and the expenses of the same.<sup>17</sup> It has been held that a transfer of property by an insolvent with intent to prefer a creditor is not an act of bankruptcy unless the transferee has then some other creditor whose claim could be proven in bankruptcy.<sup>18</sup>

<sup>9</sup> 30 St. at L. 544, 545, § 1; *In re Shapiro*, 106 Fed. R. 495; *In re Greenberg*, 106 Fed. R. 496.

<sup>10</sup> *In re Baker-Ricketson Co.*, 97 Fed. R. 489.

<sup>11</sup> *May v. Le Claire*, 18 Fed. R. 164. *Cf. Anshutz v. Hoerr*, 1 Fed. R. 592; *In re Rome Planing Mill*, 99 Fed. R. 937; *In re Baumann*, 96 Fed. R. 946.

<sup>12</sup> *In re Baumann*, 96 Fed. R. 946.

<sup>13</sup> *Johnson v. Wald (C. C. A.)*, 93

Fed. R. 640. *Cf. In re Grant*, 106 Fed. R. 496; 30 St. at L. 544, § 1.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Goldman v. Smith*, 93 Fed. R. 182.

<sup>16</sup> *In re Ft. Wayne El. C'n*, 99 Fed. R. 400; *Strobel & Wilken Co. v. Knost*, 99 Fed. R. 409; *John T. Pirie v. Chicago T. & Tr. Co.*, — U. S. — (1901).

<sup>17</sup> *In re Pearson*, 95 Fed. R. 425.

<sup>18</sup> *Beers v. Hanlin*, 99 Fed. R. 605.

(3) The preponderance of authority holds that affirmative action by the debtor is not a requisite to his suffering or permitting a creditor to obtain a preference through legal proceedings;<sup>19</sup> and that a failure to prevent the preference is an act of bankruptcy;<sup>20</sup> even when judgment is entered and a levy made under execution without the debtor's knowledge in pursuance of a warrant of attorney given when he was solvent more than four months before.<sup>21</sup> The preference through legal proceedings means any proceeding in a court of justice, whether interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors;<sup>22</sup> such as an attachment,<sup>23</sup> and irrespective of the question whether the attachment was made in time to give the attaching creditor a valid lien.<sup>24</sup> It has been held that liens acquired by legal proceedings more than four months before the petition in bankruptcy was filed;<sup>25</sup> the appointment of a receiver of a corporation, although certain classes of persons obtain, by the State law, a preference in a distribution of assets by the receiver,<sup>26</sup> and the recovery of judgment for the foreclosure of a lien more than four months old with a levy upon the land covered thereby, even when the judgment is general, provided that no levy is made upon any property not bound by the lien,<sup>27</sup> are not acts of bankruptcy. The creditors need not wait until the sale takes place, but they may file their petition within a few days before the day for which it is advertised, and upon a proper showing obtain an injunction.<sup>28</sup>

(4) A general assignment for the benefit of creditors is an

<sup>19</sup> In re Rome Planing Mill, 96 Fed. R. 812; In re Moyer, 93 Fed. R. 188; In re Cliffe, 94 Fed. R. 854. *Contra*, Duncan v. Landis (C. C. A., 2d Ct.), 106 Fed. R. 889.

<sup>20</sup> Ibid.

<sup>21</sup> In re Moyer, 93 Fed. R. 198. *Contra*, In re Nelson, 98 Fed. R. 76; Bal-four v. Wheeler, 18 Fed. R. 893; Duncan v. Landis (C. C. A.), 106 Fed. R. 839.

<sup>22</sup> In re Rome Planing Mill, 96 Fed. R. 812, 815.

<sup>23</sup> In re Richman, 91 Fed. R. 624.

<sup>24</sup> Parmenter Mfg. Co. v. Stoeber (C. C. A.), 97 Fed. R. 830.

<sup>25</sup> In re Ferguson, 95 Fed. R. 429.

Where the sheriff had been instructed by the attorney for the judgment creditors to do nothing until further orders under executions on confessed judgments levied a year before, and the keeper who had been placed in charge was withdrawn, it was held that these executions became dormant and that new executions issued and levied under the same judgments constituted new acts of bankruptcy. Ibid.

<sup>26</sup> In re Baker-Ricketson Co., 97 Fed. R. 489.

<sup>27</sup> In re Chapman, 99 Fed. R. 895.

<sup>28</sup> In re Rome Planing Mill, 96 Fed. R. 812.



act of bankruptcy irrespective of the solvency of the assignor or his good faith, and whether or not he intends to prefer any creditors.<sup>29</sup>

(5) It has been held that the laws of Massachusetts do not permit the officers or the directors of a manufacturing corporation to admit, in writing, its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, even when ratified by a vote of the stockholders after the petition is filed;<sup>30</sup> and that an admission by an officer, made after the filing of a petition in involuntary bankruptcy under authority by an unanimous vote of the stockholders previously given to make the admission, "in the event of an involuntary petition in bankruptcy being filed against said company," is not sufficient.<sup>31</sup>

**§ 477. Petitions in bankruptcy.**— "Petitions shall be filed in duplicate, one copy for the clerk and one copy for service on the bankrupt."<sup>1</sup> "All petitions and the schedules filed

<sup>29</sup> *West Co. v. Lea*, 174 U. S. 590. So is a general assignment by the officers of a corporation under the authority of a resolution of its board of directors in pursuance of a vote at a stockholders' meeting, although against the objection of a minority of the stockholders, *Clark v. Am. Mfg. & Em. Co.* (C. C. A.), 101 Fed. R. 962; and a confession of judgment to a trustee for all of the confessor's creditors. *In re Green*, 106 Fed. R. 313. It has been held that a voluntary application by a corporation for its dissolution and the appointment at its request of a receiver to wind up its affairs and distribute its assets on the ground of its insolvency is not "a general assignment for the benefit of its creditors" and an act of bankruptcy. *In re Empire Met. Bedstead Co.* (C. C. A.), 98 Fed. R. 981; *In re Harper & Bros.*, 100 Fed. R. 266. And that neither is the appointment of a receiver for a partnership on the application of the administrator of the deceased partner, although not opposed by the survivors; and that a partnership is

not insolvent so long as the firm and so much of the individual property as is applicable thereto is sufficient to pay the copartnership debts, although the only solvent partner died. *Vaccaro v. Security Bank* (C. C. A.), 103 Fed. R. 486. See also *Davis v. Stevens*, 104 Fed. R. 235, 241, 242. But an act of bankruptcy by a corporation such as permitting judgment and execution against it is not obviated by the institution of a voluntary proceeding for its dissolution. *In re Storm*, 103 Fed. R. 618.

<sup>30</sup> *In re Bates Mach. Co.*, 91 Fed. R. 625. It has been held that the directors of a New York corporation have the power to authorize an officer to make the statutory admission. *In re Marine Mach. & Conv. Co.*, 91 Fed. R. 620.

<sup>31</sup> *In re Baker-Ricketson Co.*, 97 Fed. R. 489.

§ 477. <sup>1</sup> 30 St. at L. 544, 561, § 59. It must be filed with the clerk, not sent immediately to the judge. *In re Sykes*, 106 Fed. R. 669. As to the time of filing, see *In re Stevenson*, 94 Fed. R. 110; *In re Washburn*, 99 Fed.

therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference."<sup>2</sup> Forms of the petitions are prescribed by the General Orders.<sup>3</sup> The rules of the different District Courts make special requirements concerning petitions and bankruptcy. In North Carolina the petitions must be set forth in the prescribed printed forms.<sup>4</sup> The petition must be verified.<sup>5</sup> A petition in a voluntary bankruptcy must be accompanied by schedule showing the names, with their residences, a description of the nature and consideration of the debts, and a reference to the ledger and vouchers of all the creditors, separately specifying those to whom priority is secured by law, those who hold securities with the particulars of the security, and in case of unsecured creditors, whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as partner or joint contractor with any other person, and if so, with whom. The schedules must also contain statements of the liabilities of the bankrupt on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers, with specifications of the same; of all accommodation paper signed, accepted, or indorsed by him and unpaid; of all property owned by the bankrupt, with specifications, and separately classified as real estate, personal property, choses in action, property in

R. 84; In re Romanow, 92 Fed. R. 510; In re Dupree, 97 Fed. R. 28; In re Appel, 103 Fed. R. 931.

<sup>2</sup> G. O. v.

<sup>3</sup> See Appendix, *infra*. Form No. 8, *mutatis mutandis*, should be used for a petition in involuntary bankruptcy against a partnership. Mather v. Coe, 92 Fed. R. 333. It has been held that such a petition should show the insolvency of each partner as well as the insolvency of the firm. In re Blair, 99 Fed. R. 76. But see In re Meyer (C. C. A.), 98 Fed. R. 976, 979, quoted *supra*, § 475, note 9. The same petition in voluntary bankruptcy may be presented on behalf of a partnership and on behalf of each member individually, provided that the schedules contain the individual debts and

assets as well as those of the firm. In re Gay, 98 Fed. R. 870. Cf. In re McFaun, 96 Fed. R. 592.

<sup>4</sup> Mahoney v. Ward, 100 Fed. R. 278. Cf. Mather v. Coe, 92 Fed. R. 333.

<sup>5</sup> 80 St. at L. 544, 551, sec. 18. The affidavit of the attorney for the petitioners might be held insufficient. In re Simonson, 92 Fed. R. 904; In re Nelson, 98 Fed. R. 76. An informality in the verification is waived by a plea or answer to the merits. Simonson v. Sinsheimer, 95 Fed. R. 948; Leidigh Carriage Co. v. Stengel (C. C. A.), 95 Fed. R. 367. An omission by a notary to affix his seal to the verification of the petition and the proof of debts is not a jurisdictional defect. In re Donnelly, 5 Fed. R. 783.

reversion, remainder, or expectancy, including property held in trust for the debtor, or subject to any power or right to dispose of or to charge; and a particular itemized statement of the property claimed as exempt; and a list of all books, papers, deeds and writings relating to the bankrupt business and the estate which are in existence, with the names of the persons who hold them in their possession.<sup>6</sup>

“In all cases of involuntary bankruptcy, in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.”<sup>7</sup>

“Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.”<sup>8</sup>

In cases of both voluntary and involuntary bankruptcy the petitioner must deposit with the clerk before filing the petition twenty-five dollars to pay the fees of the clerk, referee and trustee, “except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees.”<sup>9</sup>

<sup>6</sup> Form 1. See *Sellers v. Bell* (C. C. A.), 94 Fed. R. 801.

<sup>7</sup> G. O. ix.

<sup>8</sup> 30 St. at L. 544, 547, § 2.

<sup>9</sup> 30 St. at L. 544, 556, 557, 559, §§ 40, 48, 51, 52. See *supra*, § 200. It was

It has been held that a petition which alleges that the debtor suffered creditors to obtain a preference through legal proceedings must specify the details of the transaction constituting the preference;<sup>10</sup> that a petition is defective for lack of certainty when it merely alleges that the debtor has, within four months last past, transferred large amounts of his property to one or more of his creditors with intent to prefer such creditors over his other creditors, without specifying the times, places, persons and circumstances of the preference;<sup>11</sup> that a petition is multifarious when it unites prayers for an adjudication in bankruptcy, for a provisional seizure of his property by the marshal, and for an injunction against the disposition of the property by attaching creditors and a receiver of a State court.<sup>12</sup> It seems, however, that these objections are waived by a general denial and a demand for a trial by jury;<sup>13</sup> and that they can be cured by amendment.<sup>14</sup>

“The court may allow amendments to the petition and

held, when a petition was filed on behalf of a partnership accompanied by separate petitions on behalf of each partner, that \$25 should be deposited with each petition, *In re Barden*, 101 Fed. R. 553; but when a single petition was filed on behalf of the firm and of the individuals, that but one deposit need be made. *In re Gay*, 98 Fed. R. 870; *In re Langslow*, 98 Fed. R. 869. It has been held that the affidavit of the proposed voluntary bankrupt is not conclusive. *In re Collier*, 93 Fed. R. 191. But see *Sellers v. Bell* (C. C. A.), 94 Fed. R. 801. That when the circumstances, as, for example, the appearance for the petitioner of counsel not shown to act gratuitously, cast doubt upon the truth of the affidavit, the court may direct a reference to determine whether the bankrupt should be relieved from paying the fees. *In re Collier*, 93 Fed. R. 191. That if the bankrupt has enough exempt property to pay the fees, he will not be excused therefrom. *In re Collier*, 93 Fed. R. 191; *In re Bean*, 100 Fed. R.

262. But see *Sellers v. Bell* (C. C. A.), 94 Fed. R. 801. That he will not be required to pay the filing fees out of money subsequently earned by him. *Sellers v. Bell* (C. C. A.), 94 Fed. R. 801. That the necessary fees, in addition to those included in the \$25, must be paid by the pauper before his discharge, unless he can show to the court special circumstances which entitle him to relief. *In re Fees Payable by Voluntary Bankrupts*, 95 Fed. R. 120. And that the filing fee will be returned to petitioning creditors out of the assets of the estate. *In re J. W. Harrison Mercantile Co.*, 95 Fed. R. 123. For a case where a witness was required to pay the expenses of a reference, see *In re Scott*, 8 Fed. R. 420.

<sup>10</sup> *In re Cliffe*, 94 Fed. R. 854.

<sup>11</sup> *In re Nelson*, 98 Fed. R. 76.

<sup>12</sup> *In re Ogles*, 93 Fed. R. 426. See *Mather v. Coe*, 92 Fed. R. 333.

<sup>13</sup> *In re Cliffe*, 94 Fed. R. 854. See *Mather v. Coe*, 92 Fed. R. 333.

<sup>14</sup> *Ibid.*

schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."<sup>15</sup> It has been held that a petition of voluntary bankruptcy may be withdrawn at any time before a creditor has proved a claim,<sup>16</sup> provided all costs and fees of officers are paid.<sup>17</sup>

§ 478. **Process and notices to creditors.**—"Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States."<sup>1</sup> The manner of serving subpoenas in suits of equity both personally<sup>2</sup> and by publication<sup>3</sup> has been described in a preceding chapter of this book.

"Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular

<sup>15</sup> G. O. xi; *In re Cliffe*, 94 Fed. R. 854; *In re Lange*, 97 Fed. R. 197; *In re Merwin*, 95 Fed. R. 634; *In re Nelson*, 98 Fed. R. 76; *In re Ogles*, 93 Fed. R. 426; *In re Miller*, 104 Fed. R. 764; *In re Kean*, 2 Hughes, 322; s. c., Fed. Cases 7,630. As to the time when an amended petition is considered to have been filed, see *In re Washburn*, 99 Fed. R. 84. For a case where an amendment of the schedules was not allowed, see *In re Moran*, 105 Fed. R. 901.

<sup>16</sup> *In re Hebbart*, 104 Fed. R. 322.

<sup>17</sup> *In re Salaberry*, 107 Fed. R. 95. § 478. <sup>1</sup> 30 St. at L. 544, 551, § 18.

<sup>2</sup> *Supra*, §§ 94, 95.

<sup>3</sup> *Supra*, § 97. It has been held that where service is made upon him outside of the district, the court acquires no jurisdiction over the person of the bankrupt. *In re Appel*, 103 Fed. R. 931. For the proof requisite for an order of service by publication of notice to creditors, see *In re Dvorak*, 107 Fed. R. 76.

case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.”<sup>4</sup>

“All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.”<sup>5</sup>

“Formal service of the subpoena may be waived, by a proper and authorized acceptance of service being entered thereon by the alleged bankrupt; but in the case of corporations, actual service of the writ obviates all question upon the right of a corporate official to accept service of process in a case attacking the existence of the corporation. The return-day having been thus fixed, then the case must remain in the clerk’s office until the expiration of the ten days allowed to the bankrupt or any creditor to appear and contest the facts averred in the petition. A waiver on the part of the bankrupt of this period of time cannot deprive creditors of the right to appear in opposition to the petition, and until that time has elapsed it cannot be known whether a contest will or will not be made on behalf of creditors.”<sup>6</sup>

“Creditors shall have at least ten days’ notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon application for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings. Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices shall be published as the court shall direct. All notices

<sup>4</sup> 30 St. at L. 544, 554, § 28.

<sup>5</sup> G. O. iii.

<sup>6</sup> In re L. Humbert & Co., 100 Fed. R. 439, 440, per Shiras, J.



shall be given by the referee unless otherwise ordered by the judge.”<sup>7</sup>

“Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition has been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in case of debtors against whom adjudication of bankruptcy shall be made.”<sup>8</sup>

§ 479. Pleadings by the respondents in bankruptcy.—In involuntary bankruptcy, “the bankrupt, or any creditor, may appear and plead to the petition within ten days after the return date, or within such further time as the court may allow.”<sup>1</sup> “All pleadings setting up matters of fact shall be verified under oath.”<sup>2</sup> “If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior

<sup>7</sup> 30 St. at L. 544, 561, § 58.

<sup>8</sup> G. O. viii. See *In re Murray*, 96 Fed. R. 600; *In re Russell*, 97 Fed. R. 82; *In re Altman*, 95 Fed. R. 263.

§ 479. <sup>1</sup> 30 St. at L. 544, 551, § 18.

The default of the bankrupt does not make the proceeding voluntary. *Mattoon Nat. Bank v. First Nat. Bank (C. C. A.)*, 102 Fed. R. 728.

<sup>2</sup> *Ibid.*

to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.”<sup>3</sup> The form of the answer denying insolvency and the commission of the alleged act of bankruptcy is prescribed by the General Orders.<sup>4</sup> It has been held that the creditors of a voluntary bankrupt cannot file answers to his petition.<sup>5</sup>

**§ 480. Interlocutory orders, warrants, injunctions, receivers and arrests.**—“A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he

<sup>3</sup> 30 St. at L. 544, 561, § 59.

<sup>4</sup> Form VI. It has been held that an answer must follow this form, and that if it responds to multifarious matter in the petition or is unnecessarily defensive, it must be prepared in the official form and refiled as of the original date; the original answer, however, remaining on file. *Mather v. Coe*, 93 Fed. R. 333. *Contra*, *In re Paige*, 99 Fed. R. 538. *Cf.* *Bray v. Cobb*, 91 Fed. R. 102. It has been held that an issue as to the sufficiency of an answer cannot be raised by demurrer; but that the creditors should then set the case down for hearing on the petition and answer according to the rules of equity practice. *Goldman v. Smith*, 93 Fed. R. 182. An allegation in an answer that the petitioners at the time of the commission of the alleged act of bankruptcy did not have provable claims which amounted, in excess of the value of securities held by them, to five hundred dollars, does not traverse an allegation in the petition, in

accordance with the official form, that the petitioners have provable claims to that amount. *In re John A. Etheridge F. Co.*, 92 Fed. R. 329. It is no defense to a petition in involuntary bankruptcy that the petitioners had previously agreed to release the debtor upon payment of one-half of their claim, when they have not been paid, and one-half of their claims exceed the jurisdictional amount. *Simonson v. Sinsheimer (C. C. A.)*, 95 Fed. R. 948. Nor is the motive of the creditors material. *In re Simonson*, 92 Fed. R. 904; but see *In re Harper & Bros.*, 100 Fed. R. 266. An answer signed in the name of a corporation by its president is presumed to be filed by the authority of the corporation; and it has been held that none but the corporation, its stockholders and its creditors can claim that it was not authorized. *In re Columbia R. E. Co.*, 101 Fed. R. 965.

<sup>5</sup> *In re Jehu*, 94 Fed. R. 638.

shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.”<sup>1</sup>

“The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court, or a judge thereof, that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.”<sup>2</sup>

The District Courts and other courts of bankruptcy have express power to “appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;” to “authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interest of the estates;” and to “make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.”<sup>3</sup> It has been held: that they have power to grant injunctions against interference

§ 480. <sup>1</sup> 80 St. at L. 544, 565, § 69.

98 Fed. R. 970. See *In re Ketchum* (C. C. A.), 108 Fed. R. 85.

<sup>2</sup> 30 St. at L. 544, 549, § 9. It has been held that the bankrupt may be arrested in other cases. *In re Lipke*,

<sup>3</sup> 80 St. at L. 544, 545, 546, § 2.

with the property of the alleged bankrupt by himself,<sup>4</sup> by his assignee in insolvency;<sup>5</sup> by the vendee of his assignee in insolvency, who had bought after the adjudication in bankruptcy;<sup>6</sup> by the vendee of his assignee in insolvency who had bought under suspicious circumstances within four months before the petition in bankruptcy was filed and who had thereafter obtained a writ of sequestration from a State court;<sup>7</sup> by a State sheriff who had made a levy within four months before the filing of the petition;<sup>8</sup> by a receiver appointed by a State court in proceedings supplementary to execution, several years before the institution of the bankruptcy proceedings, but who had not previously taken possession;<sup>9</sup> by a chattel mortgagee who had taken possession before the bankruptcy proceedings;<sup>10</sup> but not against municipal officers engaged in collecting taxes.<sup>11</sup> Injunctions have also been granted against the prosecution in a State court of a suit of ejectment by a landlord<sup>12</sup> and of proceedings supplementary to execution by a creditor.<sup>13</sup>

A court of bankruptcy has jurisdiction to determine whether a debt is of such a character as is released by a discharge in bankruptcy; and to grant an injunction against a prosecution in a State court pending bankruptcy proceedings to collect such a debt; and to enjoin the execution of process issued be-

<sup>4</sup> *So. L. & Tr. Co. v. Benbow*, 96 Fed. R. 514.

<sup>5</sup> *Rumsey & Sikemier Co. v. Novelty & Mach. Mfg. Co.*, 99 Fed. R. 699; *Davis v. Bohle* (C. C. A.), 92 Fed. R. 825; *In re Gutwillig* (C. C. A.), 92 Fed. R. 837; *In re Sievers*, 91 Fed. R. 366.

<sup>6</sup> *Wall v. Cox*, 181 U. S. 244.

<sup>7</sup> *In re Whitener* (C. C. A.), 105 Fed. R. 180.

<sup>8</sup> *In re Gutwillig*, 90 Fed. R. 481; *In re Michel*, 6 Fed. R. 706. *Contra*, *In re Easley*, 93 Fed. R. 419. It was held, however, that attaching creditors and a receiver appointed at their instance by State court should not be enjoined before they had been served with process or voluntarily appeared. *In re Ogles*, 93 Fed. R. 426.

<sup>9</sup> *So. L. & Tr. Co. v. Benbow*, 96 Fed. R. 514.

<sup>10</sup> *In re Nathan*, 92 Fed. R. 590. It

was held otherwise, when the chattel mortgagee had taken possession before the filing of the petition in bankruptcy, and thereafter brought a foreclosure suit against the bankrupt and his trustee in bankruptcy in a State court. *Heath v. Shaffer*, 93 Fed. R. 646. See also *In re Rockwood*, 91 Fed. R. 868. Where a mortgagee of real property had obtained a judgment of foreclosure and sale in a State court before the institution of the proceedings in bankruptcy, and it appeared that there was no surplus, an injunction was refused. *In re Holloway*, 93 Fed. R. 638.

<sup>11</sup> *In re Duryee*, 2 Fed. R. 68.

<sup>12</sup> *In re Chambers, Calder & Co.*, 98 Fed. R. 865.

<sup>13</sup> *In re Kletchka*, 92 Fed. R. 901.

fore or after judgment in such a suit.<sup>14</sup> The determination of the State court upon the question is not conclusive;<sup>15</sup> and even if the District Court errs in granting such an injunction, its order is not void, and must be respected, and will be enforced until it is reversed or set aside.<sup>16</sup>

The court refused to issue a warrant to the marshal to seize property held by a person not a party to the proceedings under a claim of title adverse to the bankrupt, although under a conveyance which it was claimed was an illegal preference and avoided by the bankruptcy.<sup>17</sup> A receiver appointed to take charge of the property of a bankrupt until the selection and qualification of a trustee may be ordered to sell the whole or any part of the property when that is necessary to prevent a loss, and a sale made by him under such circumstances without authority may be afterwards ratified by the court.<sup>18</sup> It has been held that he is an officer who has the right to have a summary examination of the bankrupt or any other person concerning the acts, conduct, or property of the bankrupt;<sup>19</sup> that he may be authorized to sue at law or in equity to recover property of the bankrupt;<sup>20</sup> but that he should not, before an adjudication in bankruptcy, be authorized to bring such a suit in another State;<sup>21</sup> and that he has no right to institute a suit to recover the amount of a preferential payment made by the bankrupt before the institution of the proceedings.<sup>22</sup> It seems that the petition for a warrant of seizure by the marshal for an injunction or receiver should not be joined with that for the involuntary bankruptcy.<sup>23</sup>

§ 481. Trials and references.—“If the bankrupt, or any of his creditors, shall appear within the time limited and controvert the facts alleged in the petition, the judge shall determine,

<sup>14</sup> *Knott v. Putnam*, 107 Fed. R. 907.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Wagner v. U. S. (C. C. A.)*, 104 Fed. R. 133.

<sup>17</sup> *In re Kelly*, 91 Fed. R. 504.

<sup>18</sup> *In re Becker*, 98 Fed. R. 407. It seems that before an adjudication in bankruptcy, a referee cannot appoint appraiser nor order the sale of the real estate free from liens. *In re Styer*, 91 Fed. R. 290. For circumstances which were held to justify

the appointment of a receiver, see *In re Fixen & Co.*, 96 Fed. R. 748; *In re John A. Etheridge Furniture Co.*, 92 Fed. R. 829.

<sup>19</sup> *In re Fixen & Co.*, 96 Fed. R. 748.

<sup>20</sup> *Ibid.*

<sup>21</sup> *In re Schrom*, 97 Fed. R. 760.

<sup>22</sup> *Boonville Nat. Bank v. Blakey (C. C. A.)*, 107 Fed. R. 891.

<sup>23</sup> *In re Kelly*, 91 Fed. R. 504; *In re Ogles*, 93 Fed. R. 426.

as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and makes the adjudication or dismiss the petition.”<sup>1</sup> “If, on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.”<sup>2</sup> “If the judge is absent from the district or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.”<sup>3</sup> “Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district or the division of the district in which the petition is filed, at the time of the filing, the clerk shall forthwith refer the case to the referee.”<sup>4</sup> “A person against whom an involuntary peti-

§ 481. <sup>1</sup> 30 St. at L. 544, 551, § 18.

Where the case is submitted upon the pleadings the allegations of the answer must be taken as true; and if a material allegation in the petition is denied, an adjudication of bankruptcy cannot be made in the absence of evidence in support of the petition. In *re Taylor* (C. C. A.), 102 Fed. R. 728. It has been held that where a material issue was the indebtedness of the bankrupt to a petitioner, an adjudication of bankruptcy which found that issue in favor of the latter was conclusive evidence of the validity of his claim, which could not thereafter be disputed by either the bankrupt or another creditor. In *re Henry Ulfelder Cl. Co.*, 98 Fed. R. 409. As to the effect of the adjudication upon a collateral proceeding, see *Graham v. Boston H. & E. R. Co.*, 14 Fed. R. 758; *s. c.*, 118 U. S. 161.

<sup>2</sup> 30 St. at L. 544, 551, § 18.

<sup>3</sup> 30 St. at L. 544, 551, § 18. The clerk cannot refer a petition in in-

voluntary bankruptcy to a referee for adjudication where an issue is made upon the allegations in the petition by the bankrupt or any other creditor. In *re L. Humbert Co.*, 100 Fed. R. 489. Where, after the reference of a petition by part of a firm, the other partners appeared and contested the adjudication, it was held that the referees must certify the issue to the judge. In *re Murray*, 96 Fed. R. 600.

<sup>4</sup> 30 St. at L. 544, 551, § 18. A deputy clerk has no power to refer a petition in bankruptcy. *Bray v. Cobb*, 91 Fed. R. 102. But an order of reference made by the judge, and attested by the deputy, is valid. *Bray v. Cobb*, 91 Fed. R. 102. The clerk cannot refer a petition, whether voluntary or involuntary, unless the judge is absent from the division of the district where the proceeding is pending at the time when the reference may be made. In *re L. Humbert Co.*, 100 Fed. R. 489.



tion has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the District Courts within the jurisdiction of a Circuit Court of the United States, it may be certified for trial to the Circuit Court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such Circuit Court has or is to have a jury first in attendance. The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force, or such as may be hereafter enacted in relation to trials by jury.”<sup>5</sup>

Referees are appointed by the courts of bankruptcy within the territorial limits of their jurisdiction, each for a term of two years, subject to removal because their services are not needed, or for other cause.<sup>6</sup> The limits of the districts of the referees are designated by the courts that appoint them, which have power to change the same from time to time, so that each county, where the services of a referee are needed, may constitute at least one district.<sup>7</sup> Each court of bankruptcy has discretion as to the number of referees which it shall appoint.<sup>8</sup>

<sup>5</sup> 30 St. at L. 544, 551, § 19. See *supra*, §§ 374, 301-306. It has been held that where the defense by the debtor is an alleged estoppel by conduct of the petitioners, he is not entitled to a trial by jury, *Simonson v. Sinsheimer* (C. C. A.), 100 Fed. R. 426; that where no demand was made or answer filed until after the return day of the subpoena the right was waived, *Bray v. Cobb*, 91 Fed. R. 102; and that the unsuccessful party is entitled to a bill of ex-

ceptions. *Duncan v. Landis* (C. C. A.), 106 Fed. R. 839.

<sup>6</sup> 30 St. at L. 544, 555, § 34. “Whenever the office of a referee is vacant, or its occupant is absent, or disqualified to act, the judge may act, or may appoint another referee; or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.” *Ibid.*, § 48. See *Bray v. Cobb*, 91 Fed. R. 102.

<sup>7</sup> 30 St. at L. 544, 555, § 34.

<sup>8</sup> 30 St. at L. 544, 555, § 37.

The qualifications of a referee are prescribed by the statute.<sup>9</sup> Their jurisdiction is as follows: "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings."<sup>10</sup>

<sup>9</sup> "Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the Courts of Bankruptcy or Circuit Courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents

of, or have their offices in, the territorial districts for which they are to be appointed." Ibid., § 85.

<sup>10</sup> 30 St. at L. 544, 555, § 88. Each referee must account to the judge under oath with vouchers on the first Tuesday of each month. G. O. xxvi. The referee has power, upon the application of the trustee in bankruptcy, to cite the bankrupt to appear before him and show cause why he should not be ordered to surrender the property in his possession which it is claimed constitutes assets of the estate; and the referee can make an order in accordance with the evidence after a hearing upon the return of the order to show cause. In

The duties of referees are thus prescribed: Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and list of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken, or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase,

re Oliver, 96 Fed. R. 85; In re Mayer, 98 Fed. R. 839. See *infra*, § 484, note 2. It was held under the act of 1867 that a register had no power upon the application of creditors to issue a summons for the examination of a trustee appointed under section 48 and for the production of books and

papers by him, In re Hicks, 2 Fed. R. 851; and that the issues upon a petition to determine whether certain assets were a part of the bankrupt estate might be referred to a register as a special master. In re Thomas, 35 Fed. R. 837.

directly or indirectly, any property of an estate in bankruptcy.<sup>11</sup>

“A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, that no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.”<sup>12</sup>

“The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in Circuit Courts of the United States. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be trans-

<sup>11</sup> 30 St. at L. 544, 555, 556, § 82. It has been held that a referee who is a debtor to the bankrupt is not disqualified; but that the court upon being apprised of that fact may revoke the order of reference and send the case to another referee. *Bray v. Cobb*, 91 Fed. R. 102.

<sup>12</sup> 30 St. at L. 544, 556, § 41. The court cannot authorize the referee to carry an order or judgment into effect by the commitment of a person for contempt. *Smith v. Belford* (C. C. A.), 106 Fed. R. 658.

mitted to the court of bankruptcy and shall there remain as a part of the records of the court.”<sup>13</sup>

The General Orders provide as follows:

“1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

“2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

“3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.”<sup>14</sup>

“Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.”<sup>15</sup> “In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.”<sup>16</sup> “When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question

<sup>13</sup> 30 St. at L. 544, 556, 557, § 42.

<sup>14</sup> G. O. xii.

<sup>15</sup> G. O. xx.

<sup>16</sup> G. O. xxiii.

presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.”<sup>17</sup>

The referee's certificate should present specific questions upon which the opinion of the judge is desired.<sup>18</sup> It has been said that a general review of the proceedings before the referee is not permitted.<sup>19</sup>

§ 482. Evidence.—“Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.”<sup>1</sup> “A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided. Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim, notice shall also be served upon the claimant, and when, in opposition to a

<sup>17</sup> G. O. xxvii.

<sup>18</sup> In re T. L. Kelly Dry Goods Co., 102 Fed. R. 747.

<sup>19</sup> Ibid.

§ 482. 180 St. at L. 544, 547, § 3. The burden of proof is otherwise upon the creditors to support the allegations of their petition. In re Rome Planing Mill, 96 Fed. R. 812. But where the bankrupt alleged that a note held by a petitioner was void

because given in consideration of a gambling transaction, it was held that the respondent had the burden of proof to show that fact. Hill v. Levy, 98 Fed. R. 94. A letter by the respondent stating his inability to pay his debts and calling a meeting of his creditors for the purpose of compromising his indebtedness is *prima facie* evidence of his insolvency. In re Lange, 97 Fed. R. 197.



discharge, notice shall also be served upon the bankrupt. Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of District Courts of the United States are now or may hereafter be admitted as evidence. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened. A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made. A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.”<sup>2</sup>

“The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.”<sup>3</sup>

Creditors must have at least ten days' notice by mail of all examinations of the bankrupt unless they waive the same in writing.<sup>4</sup> It was held that a person adjudged a bankrupt

<sup>2</sup> 80 St. at L. 544, 552, § 21.

<sup>3</sup> G. O. xxii.

<sup>4</sup> 80 St. at L. 544, 561, § 58; *supra*, § 478.

upon an involuntary petition may be ordered to attend before the referee for examination, before the first meeting of his creditors and the appointment of a trustee; and, if the examination is limited to obtaining information on which to prepare the schedules, that it is not essential to the validity of the proceeding that ten days' notice thereof by mail should have been given to creditors.<sup>5</sup>

At the first meeting of the creditors, any one whose name appears in the schedule of creditors,<sup>6</sup> and it seems that, at any time, any person who gives to the referee *prima facie* evidence of his claim, may obtain an order for the examination of the bankrupt, even if the debt has not been regularly proved.<sup>7</sup> It seems that under ordinary circumstances such an examination should be had once for all the creditors; that if no examination has previously been had, the notice to creditors to attend in opposition to the discharge should embrace also a notice of the examination of the bankrupt; and that the testimony thereupon should be taken at the expense of the creditors.<sup>8</sup>

It has been held that the examination of a third person at the request of a receiver or trustee in bankruptcy may be granted without any showing of the questions to be asked or the facts into which inquiry is to be made;<sup>9</sup> that the pendency of a suit by or against the bankrupt or his representative is not a prerequisite;<sup>10</sup> that the examination may be made concerning facts which could not be the subject of a suit in a court of the United States;<sup>11</sup> that a witness cannot refuse to attend or be examined by a receiver in bankruptcy on the ground that the order appointing a receiver was erroneously or improvidently made;<sup>12</sup> that he cannot refuse to produce books because he claims that they contain nothing relating to the bankrupt's property; but must leave the determination of that question to the court;<sup>13</sup> that an examination may be had

<sup>5</sup> In re Franklin Syndicate, 101 Fed. R. 402.

<sup>6</sup> In re Walker, 96 Fed. R. 550.

<sup>7</sup> In re Jehu, 94 Fed. R. 638.

<sup>8</sup> In re Price, 91 Fed. R. 635.

<sup>9</sup> In re Howard, 95 Fed. R. 415; In re Fixen & Co., 96 Fed. R. 748.

<sup>10</sup> In re Fixen & Co. 96 Fed. R. 748.

<sup>11</sup> In re Cliffe, 94 Fed. R. 854.

<sup>12</sup> In re Fixen & Co., 96 Fed. R. 748.

<sup>13</sup> In re Fixen & Co., 96 Fed. R. 748. But see In re Carley, 106 Fed. R. 862.

of books of a corporation managed by two bankrupts, in which their wives own substantially all the stock, and it is claimed that the corporate property is assets of the bankrupts;<sup>14</sup> that by filing the petition in bankruptcy the petitioner waives his privilege to object to the examination of his books upon the ground that this might tend to criminate him;<sup>15</sup> but that an involuntary bankrupt cannot be compelled to answer questions which might tend to criminate himself;<sup>16</sup> that the examination need not be limited to matters that occur within four months before the bankruptcy proceedings, but that inquiry may be made into previous transactions which tend to throw any light upon the facts or issues pertinent to the proceedings;<sup>17</sup> that the wife of the bankrupt is a competent witness and may be examined on behalf of or against the bankrupt upon a summary examination;<sup>18</sup> unless her testimony upon the subject is forbidden by the laws of the State where the examination is held, when it will be excluded.<sup>19</sup>

**§ 483. Meetings of creditors and appointments of trustees.**—“(a) The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. (b) At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may pub-

<sup>14</sup>In re Horgan (C. C. A.), 98 Fed. R. 414; s. c., 97 Fed. R. 819. Cf. In re Cohn, 98 Fed. R. 75.

<sup>15</sup>In re Sapiro, 92 Fed. R. 840. Cf. Mackel v. Rochester (C. C. A.), 102 Fed. R. 814.

<sup>16</sup>In re Scott, 95 Fed. R. 815. The objection cannot be taken before he

is sworn. Ibid. But see Mackel v. Rochester (C. C. A.), 102 Fed. R. 814. See *supra*, § 272.

<sup>17</sup>In re Brundage, 100 Fed. R. 613.

<sup>18</sup>In re Foerst, 93 Fed. R. 190; In re Anderson, 23 Fed. R. 482.

<sup>19</sup>In re Mayer, 97 Fed. R. 828.

licly examine the bankrupt or cause him to be examined at the instance of any creditor. (c) The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act. (d) A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. (e) The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request. (f) Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.”<sup>1</sup>

“(a) Creditors shall pass upon matters submitted to them at their meeting by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. (b) Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors’ meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.”<sup>2</sup>

The word “creditor,” in the act, includes “any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy.”<sup>3</sup> The words “secured creditor” include “a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt, has such security upon the bankrupt’s assets.”<sup>4</sup>

“The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred

§ 483. <sup>1</sup> 30 St. at L. 544, 559, 560, § 55.

<sup>2</sup> 30 St. at L. 544, 560, § 56.

<sup>3</sup> 30 St. at L. 544, § 1.

<sup>4</sup> 30 St. at L. 544, 545, § 1.

in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.”<sup>5</sup> “If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.”<sup>6</sup> “No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.”<sup>7</sup> “It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee’s bond.”<sup>8</sup> “The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.”<sup>9</sup>

No one can cast a vote of a creditor without a written proxy,<sup>10</sup> even if he be an attorney at law who has appeared generally for him in the proceedings.<sup>11</sup> Upon the election of a trustee, a secured creditor may surrender his security and vote as if his claim was unsecured; but otherwise his vote is only good for the amount of the excess of his claim over the value of his security as found by the court, or perhaps as found by the referee.<sup>12</sup> Where claims offered for proof and allow-

<sup>5</sup> 30 St. at L. 544, 557, § 44.

<sup>6</sup> G. O. xv; *In re Smith*, 93 Fed. R. 791.

<sup>7</sup> G. O. xiv.

<sup>8</sup> G. O. xvi.

<sup>9</sup> G. O. xiii.

<sup>10</sup> *In re Blankfein*, 97 Fed. R. 191; *In re Eagles*, 99 Fed. R. 695; *In re Richards*, 103 Fed. R. 849. It has been held that such a proxy may be acknowledged before a foreign con-

sul; that it may contain a power of substitution; and that when given to three or to any one or more of them, its acknowledgment before one of the three does not invalidate its appointment of the other two. *In re Sugenhimer*, 91 Fed. R. 744.

<sup>11</sup> *In re Blankfein*, 97 Fed. R. 191; *In re Scully*, 108 Fed. R. 372.

<sup>12</sup> *In re Eagles*, 99 Fed. R. 695.

ance at a meeting of creditors were disallowed and the claimants excluded from voting, the court has power, after they have been allowed upon appeal, to set aside the election, provided that their votes, if cast, would have changed the result.<sup>13</sup> It has been held that the referee has power to exclude the votes of proxies obtained from creditors by or on behalf of the bankrupts to be used in voting for a trustee of his choice; that the holders of such proxies in that case should not be counted as present at the election; and that the referee may then refuse to allow a postponement and may direct the election to proceed.<sup>14</sup> Where a trustee elected by the creditors is disapproved by the court, or declines to act, or fails to qualify, a vacancy arises which must be filled by a new election if practicable.<sup>15</sup> Appointments by the referee have been sustained when there was immediate need of action by a trustee, and after two sessions of a creditors' meeting, upon successive days, there was a failure to obtain a majority for any one;<sup>16</sup> and where, at the first creditors' meeting, there was no request that an election be had nor a nomination of any candidate.<sup>17</sup> When, at a meeting of creditors, objections are made to the person elected as trustee and the referee takes them under advisement, the meeting should be adjourned for a new election then, in case the objections are sustained and the appointment disapproved.<sup>18</sup>

**§ 484. Qualifications, duties and powers of trustees.—**“Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.”<sup>1</sup>

<sup>13</sup> Ibid.

<sup>14</sup> *Falter et al. v. Reinhard*, 104 Fed. R. 292; s. c. as *In re McGill* (C. C. A.), 106 Fed. R. 57. “Ordinarily, the creditor whose claim has been allowed should be permitted to vote in person or by proxy, and any question as to whether his vote has been improperly influenced should be reserved until the referee is called upon to approve the election, when the parties can be

fully heard and a new election ordered, if it appear that the creditors have been prevented from exercising a free and unrestricted choice.” Ibid., 104 Fed. R. 292, 294, per Thompson, J.

<sup>15</sup> *In re Lewensohn*, 98 Fed. R. 576.

<sup>16</sup> *In re Kuffler*, 97 Fed. R. 187.

<sup>17</sup> *In re Brooke*, 100 Fed. R. 432.

<sup>18</sup> *In re Lewensohn*, 98 Fed. R. 576. § 484. <sup>1</sup> 80 St. at L. 556, 547, § 45. See *In re Lewensohn*, 98 Fed. R. 576.



“(a) Trustees shall respectively (1) account for and pay over to the estate under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amount of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment. (b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.”<sup>2</sup>

<sup>2</sup> 30 St. at L. 544, 550, § 46. Cf. *Brooks*, 91 Fed. R. 508; *In re Mayer*, 98 Fed. R. 839. This power will only be exercised when the existence of the assets and the control of the bankrupt over them are proved beyond a reasonable doubt. *In re Schlesinger*, 97 Fed. R. 930; *In re Mayer*, 98 Fed. R. 839; *In re Anderson*, 103 Fed. R. 854. Equitable set-offs have been allowed bankrupts upon such applications. *In re Tudor*, 100 Fed. R. 796; *In re Barrow*, 98 Fed. R. 582; *In re McCormick*, 97 Fed. R. 566; *In re*

*Merchants' Nat. Bank v. Slagle*, 106 U. S. 558. The court has the power, upon the application of the trustee, to order the bankrupt to deliver to him money or property in the latter's possession or under his control and which are part of the assets. *In re Purvine* (C. C. A.), 96 Fed. R. 192; *In re Tudor*, 100 Fed. R. 796; *In re Schlesinger*, 97 Fed. R. 930; *In re Deuell*, 100 Fed. R. 633; *In re Rosser*, 96 Fed. R. 308; *In*

"The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor."<sup>3</sup>

"The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest."<sup>4</sup>

"(b) Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties. (c) The creditors of a bankrupt estate, at their first meeting, after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so. (d) The court shall require evidence as to the actual value of the property of sureties. (e) There shall be at least two sureties upon each bond. (f) The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond. (g) Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected. (h) Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

**Fed. R. 930.** The order is void unless notice of the application is given to the bankrupt. *In re Rosser* (C. C. A.), 101 Fed. R. 562.

<sup>3</sup> 30 St. at L. 546, 557, § 46.

<sup>4</sup> 30 St. at L. 544, 558, § 42.

(i) Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees. (j) Joint trustees may give joint or several bonds. (k) If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.”<sup>5</sup>

“Suits upon trustees’ bonds shall not be brought subsequent to two years after the estate has been closed.”<sup>6</sup>

“(a) The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate. (b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator. (c) The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.”<sup>7</sup>

“(a) The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.<sup>8</sup> (b) The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. (c) A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him. (d) Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.”<sup>9</sup>

<sup>5</sup> 30 St. at L. 544, 558, § 50.

<sup>6</sup> Ibid.

<sup>7</sup> 30 St. at L. 544, 553, § 26. It has been held that the court may set aside the award of the arbitrators for any reason that would justify a new trial of an action at common law. In re McLam, 97 Fed. R. 922. And that it may be set aside when the third arbitrator was selected by the contending parties instead of

by the two arbitrators respectively selected by them. In re McLam, 97 Fed. R. 922.

<sup>8</sup> 30 St. at L. 544, 555, § 27.

<sup>9</sup> 30 St. at L. 544, 549, § 11. This does not authorize his substitution in a suit such as an action for malicious prosecution, the proceeds of which form no part of the assets. In re Haensell, 91 Fed. R. 355. The trustee is bound in collateral pro-

“(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent-rights, copyrights, and trade-marks; (3) powers he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash-surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash-surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property. (b) All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold, subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value. (c) The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee. (d) Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as

ceedings by a judgment against him holding that the trustee was estopped by his failure to intervene in a suit in which he was substituted for the bankrupt. In re Van Alstyne, 100 Fed. R. 929. For a case & Tr. Co. (C. C. A.), 99 Fed. R. 707.

herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge. (e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value.”<sup>10</sup>

“(a) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. (b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.”<sup>11</sup> “(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or procutor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the ex-

<sup>10</sup> 30 St. at L. 444, 505, 567, § 70. It has been held that the trustee acquires the right of the bankrupt to a license to sell liquors which is transferable with or renewable with the approval of a public officer, In re Becker, 98 Fed. R. 407; In re Brod-bine, 93 Fed. R. 643; Fisher v. Cushman (C. C. A.), 103 Fed. R. 860; to a stall in a market, In re Emrich, 101

Fed. R. 231; and to membership in an exchange, Sparhawk v. Yerkes, 142 U. S. 1; In re Ketchum, 1 Fed. R. 840; In re Werder, 15 Fed. R. 789. But not to a patent applied for before the adjudication but subsequently issued. In re McDonnell, 101 Fed. R. 239. As to an insurance policy, see In re Steele, 98 Fed. R. 78.

<sup>11</sup> 30 St. at L. 544, 562, § 60.

cess may be recovered by the trustee for the benefit of the estate.”<sup>12</sup>

“Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.”<sup>13</sup>

“The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.”<sup>14</sup>

<sup>12</sup> Ibid.

<sup>13</sup> G. O. xxviii.

<sup>14</sup> G. O. xvii.



“Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.”<sup>15</sup> “No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.”<sup>16</sup>

It has been held that the trustee of a bankrupt corporation may call upon the stockholders to make good the unpaid balance upon their subscriptions; that he may collect such subscriptions by a suit in equity in the District Court of the United States where the bankruptcy proceeding is pending, irrespective of the citizenship of the parties; but that he cannot enforce the statutory liability of the directors to creditors for contracting debts in excess of the lawful amount, or for paying dividends when the corporation was insolvent.<sup>17</sup> Where an asset, such as a leasehold, is subject to burdens, the trustee is not obliged to accept it if it would be unprofitable.<sup>18</sup> In such a case it was held that the trustee might remain in possession of the premises a reasonable time in order to ascertain whether

<sup>15</sup> 30 St. at L. 544, 562, § 61.

<sup>17</sup> In re Crystal Spr. B. Co., 96 Fed.

<sup>16</sup> G. O. xxix. It was held under the act of 1867 that a depository is not obliged to keep a separate account for each bankrupt estate. *State Bank v. Dodge*, 124 U. S. 333.

R. 945.

<sup>18</sup> In re Chambers, C. & Co., 98 Fed. R. 865.

it was expedient to assume the lease; that one month was not unreasonable; and that in such a case, where that time was required for the proper packing and safe removal of the bankrupt's property thereupon, the lease was not assumed and the estate was liable only for a reasonable sum for the use and occupation of the premises.<sup>19</sup>

Under the Act of 1867, the assignee was required within six months to "cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any land owned by the bankrupt ought by law be recorded."<sup>20</sup> There is no such provision in the Act of 1878; and it has not yet been decided whether a buyer of real estate has constructive notice of an adjudication in bankruptcy and the election of a trustee of his vendor in another district.

§ 485. Proof and allowance of claims.—“(a) Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor. (b) Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim. (c) Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred. (d) Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court,

<sup>19</sup> Ibid. Cf. *In re Grimes*, 96 Fed. U. S. 29. For a similar case as to a R. 829; *Bray v. Cobb*, 100 Fed. R. 270; right to a seat in a stock exchange, *In re Secor*, 18 Fed. R. 319; *supra*, see *Sparhawk v. Yerkes*, 142 U. S. 1. § 251. For a case under the act of But see *Dushane v. Beall*, 161 U. S. 1867 where it was held that the as- 513. signee had abandoned the right to a <sup>20</sup> § 14; *Taylor v. Irwin*, 20 Fed. R. patent, see *Sessions v. Romadka*, 145 615.

unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion. (e) Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities. (f) Objections to claims shall be heard and determined as soon as the convenience of the court and the best interest of the estates and the claimants will permit. (g) The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. (h) The value of securities held by secured creditors shall be determined by converting the same into money, according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. (i) Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor. (j) Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. (k) Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. (l) Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part

thereof if rejected only in part. (m) The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. (n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the rights of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.”<sup>1</sup>

“Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt’s application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments. (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.”<sup>2</sup>

“1. Depositions to prove claims against a bankrupt’s estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must ap-

§ 485. <sup>1</sup> 30 St. at L. 544, 560, 561, § 57.

<sup>2</sup> 30 St. at L. 544, 562, 563, § 63; In re Heinsfurter, 97 Fed. R. 108.

pear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred. 2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt. 3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or, if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter. 4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original

debt. 5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof. 6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."<sup>3</sup>

The claim must be specific, and if for several services or payments it must be itemized.<sup>4</sup> A proof of claim may be amended by leave of the court or of the referee upon proof of an error or omission due to inadvertence or a mistake of fact or law.<sup>5</sup>

<sup>3</sup>G. O. xxi. Subdivision 6 does not apply to claims for expenses of the administration of the estate. In re Reliance Storage & Warehouse Co., 100 Fed. R. 619. The officer who takes the verification of the claim may be the creditor's attorney, In re Kimball, 100 Fed. R. 777; or a foreign consul, In re Sugenhimer, 91 Fed. R. 744. In the absence of a rule of court which forbids such practice, it is no objection to a claim that it is filed by the attorney for the bankrupt. In re Kimball, 100 Fed. R. 777. The bankrupt may prove against himself a claim which he holds in a representative capacity. Warner v. Spooner, 3 Fed. R. 890. A solvent

partner may prove a claim arising from his payment of a firm debt after the adjudication in bankruptcy, or if such debt has already been proved by the creditor he may be subrogated to his rights. In re Dillon, 100 Fed. R. 627. Cf. *infra*, § 487.

<sup>4</sup>In re Scott, 93 Fed. R. 418.

<sup>5</sup>In re Myers, 99 Fed. R. 691; In re Baxter, 12 Fed. R. 72. The benefit of a lien may thus be preserved. In re Falls City Shirt Mfg. Co., 98 Fed. R. 592. *Contra*, In re Wilder, 101 Fed. R. 104. A deduction may thus be made of the funds of the bankrupt in the claimant's hands. In re Myers, 99 Fed. R. 592.



It seems that the time to file a claim cannot be extended.<sup>6</sup> A creditor,<sup>7</sup> the trustee,<sup>8</sup> or, where no trustee has been appointed, the bankrupt,<sup>9</sup> may object to the allowance of a claim, or move for its re-examination or expurgation. The allowance of a claim by the referee will not be reversed by the court unless manifestly erroneous.<sup>10</sup> Upon the re-examination of a claim that has been allowed, it seems that the burden of proof is upon the objector.<sup>11</sup> A claim may be disallowed, or if allowed may be re-examined and expunged, because it is barred by the statute of limitations;<sup>12</sup> and because the claimant has joined with it other claims that are fraudulent;<sup>13</sup> but not, it has been held, because it was acquired from the original claimant after the adjudication of bankruptcy for the purpose of controlling the proceedings.<sup>14</sup> Where the petition for the re-examination of a claim is defective for lack of certainty the proper remedy is a motion for a more specific statement, not a motion to strike out part of the petition.<sup>15</sup> Mortgages which are void may be put in evidence as admissions of antecedent debts therein described.<sup>16</sup>

<sup>6</sup> *Bray v. Cobb*, 100 Fed. R. 270. Not even by the filing of a supplemental petition showing new assets. *In re Shaffer*, 104 Fed. R. 982.

<sup>7</sup> *In re Lipman*, 94 Fed. R. 353.

<sup>8</sup> *Atkins v. Wilcox* (C. C. A.), 105 Fed. R. 595.

<sup>9</sup> *In re Ankeny*, 100 Fed. R. 614.

<sup>10</sup> *In re Rider*, 96 Fed. R. 811.

<sup>11</sup> *In re Howard*, 100 Fed. R. 630; *In re Felter*, 7 Fed. R. 904. *Cf.* *In re Ankeny*, 100 Fed. R. 614.

<sup>12</sup> *In re Lipman*, 94 Fed. R. 353.

<sup>13</sup> *In re Flick*, 105 Fed. R. 503.

<sup>14</sup> *In re Headley*, 97 Fed. R. 765.

<sup>15</sup> *In re Ankeny*, 100 Fed. R. 614.

<sup>16</sup> *In re New Brunswick Carpet Co.*, 4 Fed. R. 514. For cases denying the right of a landlord to prove a claim for rent accruing subsequent to the adjudication, see *In re Jefferson*, 93 Fed. R. 948; *In re Arnstein*, 101 Fed. R. 706; *Atkins v. Wilcox* (C. C. A.), 105 Fed. R. 595; *In re Mahler*, 105 Fed. R. 428. A trustee under an insolvent assignment was not allowed to prove a claim for his

compensation and expenses. *Stearns v. Flick*, 103 Fed. R. 919. It has been held that a claim may be proved upon a contract of indorsement which matures after the adjudication and pending the proceedings, *In re Gerson*, 105 Fed. R. 891; *contra*, *In re Schaefer*, 104 Fed. R. 973; that a claim for services rendered after the adjudication, and pending the proceedings, cannot be proved, and will not be discharged, *In re Burka*, 104 Fed. R. 826; that a creditor who owes the bankrupt more than the amount of his own claim must pay it before he can make proof against the estate, *In re Gerson*, 105 Fed. R. 893; that when his principal has been preferred the guarantor can only prove his claim after the surrender of the preference, *In re Schmechel Cloak & Suit Co.*, 104 Fed. R. 64; that a creditor with several claims, one only of which has been preferred, cannot prove any until the preference has been surrendered, *In re Teslow*, 104 Fed. R.

**§ 486. Set-offs and counter-claims.**—“(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. (b) A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.”<sup>1</sup>

A deposit may be set off against the promissory notes held by the bank which is the depository.<sup>2</sup> It seems that a surety who pays the debt of his principal after the latter's adjudication in bankruptcy may set off such payment;<sup>3</sup> but it has been held that a person jointly indebted with the bankrupt, who pays the debt after the adjudication, cannot set it off against a debt due by him to the latter, although he is subrogated to the right of the payee to dividends.<sup>4</sup>

**§ 487. Priorities and liens.**—“(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. (b) The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and

229; that no claims can be liquidated except those specified in section 63a, *In re Hirschman*, 104 Fed. R. 69; and, although the point is doubtful, that preferences more than four months old must be surrendered. *Re Arnheim-Steers L. Co.*, by Referee Olney. But see *In re Ratcliff*, 107 Fed. R. 80.

§ 486. 180 St. at L. 544, 565, § 68. “If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates,

the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.” *Ibid.*, § 60.

<sup>2</sup> *In re Myers*, 99 Fed. R. 691.

<sup>3</sup> *In re Dillon*, 100 Fed. R. 627.

<sup>4</sup> *In re Bingham*, 94 Fed. R. 796. As to the right of set-off against a claim for a preferential payment, see *In re Seckler*, 106 Fed. R. 484; *In re Ryan*, 105 Fed. R. 760; *McKey v. Lee* (C. C. A.), 105 Fed. R. 923.

the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."<sup>1</sup>

"(a) Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. (b) Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the

§ 487. <sup>1</sup> 30 St. at L. 544, 563, § 64. In case of the bankruptcy of a partnership, the firm creditors have a priority over the creditors of the individual members, and the latter have a priority over the former in the distribution of the proceeds of the property of the individual partners. *Ibid.*, § 5; *supra*, §§ 475, 485; *In re Mills*, 95 Fed. R. 269; *In re Linforth*, 87 Fed. R. 386; *In re Jones*, 100 Fed. R. 781. It has been held that taxes upon exempt property, such as a homestead, must be paid and are entitled to a priority. *In re Tilden*, 91 Fed. R. 500. That a State license fee for selling liquor, although denominated a tax, is not. *In re Ott*, 95 Fed. R. 274. As to taxes, see also *In re Conhaim*, 100 Fed. R. 268. The costs of an attaching creditor, *In re Allen*, 96 Fed. R. 512; and, it seems, the fees of a State sheriff, *In re Francis Valentine Co.*, 93 Fed.

R. 953; *s. c.*, *In re F. Valentine Co.* (C. C. A.), 94 Fed. R. 793, are not entitled to a priority, except to the extent of reasonable and necessary disbursements for the preservation of the estate; unless the State law gives them a preference. *In re Lewis*, 99 Fed. R. 935. Where, however, a judgment creditor had recovered assets by setting aside fraudulent conveyances within four months before the institution of the proceedings in bankruptcy, although he had lost his lien, he was given an allowance out of the estate as indemnity for his costs and expenses. *In re Lesser*, 100 Fed. R. 433. The creditors who file a petition in involuntary bankruptcy will have the filing fee paid by them to the clerk returned to them out of the estate. *In re Silverman*, 97 Fed. R. 825. The attorney's fee to the bankrupt's attorney varies in dif-

estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate. (c) A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened. (d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act,

ferent districts. *Cf.* In re Stotts, 93 Fed. R. 438; In re Beck, 92 Fed. R. 889.

It has been held that no priority is given to the compensation due for the services of a president of a business corporation, In re Carolina Cooperation Co., 96 Fed. R. 950; a manager of a mercantile corporation, In re Grubbs-Wiley Grocery Co., 96 Fed. R. 183; or a traveling salesman, In re Scanlan, 97 Fed. R. 26; In re Greenewald, 99 Fed. R. 705. That a salesman in a store is entitled to a preference for his salary earned within three months, but not for a portion thereof retained by agreement as a fund to be used later for his benefit. In re Flick, 105 Fed. R. 508. That a State law which gives a preference to wages earned more than three months before insolvency will not be followed. In re Rouse,

Hazard & Co. (C. C. A.), 91 Fed. R. 96. But that where the State law gave a lien to certain claims for wages within the prescribed time upon filing them in a specified office, such claims after filing should be paid in priority to those otherwise entitled thereto. In re Kerby-Dennis Co. (C. C. A.), 95 Fed. R. 116, 166; In re Rouse, 91 Fed. R. 514; In re Byrne, 97 Fed. R. 762. The priorities directed in a State insolvency law will be followed, although the operation of the law is otherwise suspended by the bankruptcy law. In re Wright, 95 Fed. R. 807. The order of payment of preferred claims prescribed in the State statute is followed unless in conflict with some express provision of the bankruptcy act. In re Falls City Shirt Mfg. Co., 98 Fed. R. 592.

and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act. (e) That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State or Territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. (f) That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as

aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.<sup>2</sup>

It seems that a mere suspicion by the creditor that the debtor is insolvent, without any evidence legal or moral to support it,<sup>3</sup> even if he knows that the latter is "behind in his payments" to his creditors,<sup>4</sup> does not constitute a reasonable cause for belief in the insolvency within the meaning of the statute. All levies, judgments, attachments, and other liens obtained through legal proceedings are avoided if the levy was made or the lien first came into existence within four months before the petition was filed, although the suit in which they were made or issued was previously begun;<sup>5</sup> whether or not the defendant co-operates in the obtaining of the same;<sup>6</sup> or the creditor had knowledge of the debtor's insolvency;<sup>7</sup> in cases of voluntary as well as of involuntary bankruptcy.<sup>8</sup> It has been held that a judgment which does not create a lien, but sets aside a fraudulent conveyance and appoints a receiver for

<sup>2</sup> 30 St. at L. 544, 564, 565, § 67. See *In re Hammond*, 98 Fed. R. 845; *In re Booth*, 96 Fed. R. 943. As to the power of the court of bankruptcy to order the sale of property subject to a lien and to transfer the liens to the proceeds, see *In re Worland*, 92 Fed. R. 898; *In re Sanborn*, 96 Fed. R. 551; *In re Styer*, 98 Fed. R. 290; *In re Pittelkow*, 92 Fed. R. 901; *In re Mead*, 58 Fed. R. 812; *So. L. & Tr. Co. v. Benbow*, 96 Fed. R. 514; *Factors' & Tr. Ins. Co. v. Murphy*, 111 U. S. 738.

<sup>3</sup> *Stucky v. Masonic Sav. Bank*, 108 U. S. 74.

<sup>4</sup> *In re Eggert*, 98 Fed. R. 843; *s. o.* (C. C. A.), 102 Fed. R. 735.

<sup>5</sup> *In re Richards* (C. C. A.), 96 Fed. R. 935; *In re Higgins*, 97 Fed. R. 775; *In re Burrus*, 97 Fed. R. 926. *Contra*, *In re De La Rue*, 91 Fed. R. 510; *In re Easley*, 93 Fed. R. 419. A

judgment entered within the four months upon a judgment note previously given is avoided. *In re Rhoads*, 98 Fed. R. 899. Where the lien of the judgment does not take effect until it is docketed in the county, it is avoided if not docketed there till within the four months. *In re Dunavant*, 96 Fed. R. 542. An attachment levied more than four months before the filing of the petition, but which could not be made effective until judgment was vacated when the judgment was entered within that time. *In re Lesser*, 108 Fed. R. 201.

<sup>6</sup> *In re Richards* (C. C. A.), 96 Fed. R. 935; *In re Burrus*, 97 Fed. R. 926.

<sup>7</sup> *Ibid.*

<sup>8</sup> *In re Vaughan*, 97 Fed. R. 560. But see *In re O'Connor*, 95 Fed. R. 943.



the benefit of all the creditors, is not.<sup>9</sup> But a receivership for the benefit of the plaintiff in such a suit, if created within the four months, will be set aside,<sup>10</sup> and the judgment creditor loses his right to any preference in the distribution of the assets which he thus obtained.<sup>11</sup>

Where a sale has been made under such a levy prior to the adjudication of bankruptcy and within four months before the filing of the petition, the rights of a purchaser are not affected;<sup>12</sup> but the proceeds in the hands of the sheriff are part of the bankrupt's estate.<sup>13</sup> In the absence of any State law upon the subject, it seems that a voluntary conveyance made by a debtor to his wife or children while he was insolvent, but in ignorance of that fact, may be set aside.<sup>14</sup> A conveyance or pledge made within the four months to secure an antecedent debt under a previous parol agreement was sustained.<sup>15</sup> It has been held that a statutory lien for wages or for rent is not avoided by the filing of the petition and the adjudication of bankruptcy,<sup>16</sup> unless the lienor has taken other security within the four months, when he thereby waives his rights under the State statute.<sup>17</sup> The preponderance of authority holds that a payment on account of an antecedent debt, if made within the four months, can be recovered by the trustee in bankruptcy,<sup>18</sup> at least if the creditor had reasonable ground to believe that the debtor was insolvent or that a preference was intended. A chattel mortgage given to secure a contemporaneous loan will not be set aside.<sup>19</sup>

<sup>9</sup> In re Kavanaugh, 99 Fed. R. 928.

<sup>10</sup> In re Lesser, 100 Fed. R. 433. But see In re O'Connor, 95 Fed. R. 943.

<sup>11</sup> Ibid.

<sup>12</sup> In re Kenney, 95 Fed. R. 427.

<sup>13</sup> In re Kenney, 97 Fed. R. 554.

<sup>14</sup> Adams v. Riley, 122 U. S. 382; In re Steele, 98 Fed. R. 78. But see Vetterlein v. Barnes, 124 U. S. 169; In re Smith, 9 Fed. R. 592. For a case where the transaction was set aside when the debtor continued in possession nominally as agent for his wife after she had bought the property at a sale upon the foreclosure of a chattel mortgage, given to a relative under suspicious circumstances, see In re Smith, 100 Fed. R. 795.

<sup>15</sup> In re Sheridan, 98 Fed. R. 406.

<sup>16</sup> In re Kerby-Dennis Co. (C. C. A.), 95 Fed. R. 116. See as to mechanics' liens, In re Emslie (C. C. A.), 102 Fed. R. 291.

<sup>17</sup> In re Wolf, 98 Fed. R. 74.

<sup>18</sup> In re Ft. Wayne El. Corp., 96 Fed. R. 803; s. c., 99 Fed. R. 400; Shutts v. First Nat. Bank, 98 Fed. R. 705; In re Lange, 97 Fed. R. 197; In re Conhaim, 97 Fed. R. 923; John T. Pirie v. Chicago L. & Tr. Co., U. S. S. C. 1901. *Contra*, Blakey v. Boonville Nat. Bank, 95 Fed. R. 267; In re Eggert, 98 Fed. R. 643.

<sup>19</sup> In re Wolf, 98 Fed. R. 84.

§ 488. **Exemptions.**—"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."<sup>1</sup> It is the duty of the trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."<sup>2</sup>

"A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim for which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act."<sup>3</sup>

"The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general

§ 488. 180 St. at L. 544, 548, § 6; *Sellers v. Bell* (C. C. A.), 94 Fed. R. 801; *In re Peterson*, 95 Fed. R. 417; *In re Tilden*, 91 Fed. R. 500; *In re Steele*, 98 Fed. R. 78; *In re Pope*, 98 Fed. R. 722; *In re Woodard*, 95 Fed. R. 260; *In re McCutchen*, 100 Fed. R. 779; *In re Coffman*, 98 Fed. R. 422; *In re Smith*, 96 Fed. R. 832; *In re Buelow*, 98 Fed. R. 86; *In re Hoag*, 97 Fed. R. 548; *In re Jones*, 97 Fed. R. 778. Pension money is exempt. *In re Bean*, 100 Fed. R. 262. As to the rights of

creditors who hold waivers of exemptions, see *Woodruff v. Cheves* (C. C. A.), 105 Fed. R. 601, criticised in 15 Harv. Law Rev. 152.

<sup>2</sup> 80 St. at L. 544, 557, § 47; *In re Friedrich* (C. C. A.), 100 Fed. R. 284; *In re Diller*, 100 Fed. R. 931; *In re Camp*, 91 Fed. R. 745; *In re Woodard*, 95 Fed. R. 955; *In re Grimes*, 96 Fed. R. 529; *In re McBryde*, 99 Fed. R. 686; *In re McCutchen*, 100 Fed. R. 779; *In re Smith*, 98 Fed. R. 791.

<sup>3</sup> Cf. 80 St. at L. 544, 549, § 9.

orders to be had before the judge, shall be had before the referee."<sup>4</sup>

"If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order."<sup>5</sup>

It has been held that the bankrupt cannot be arrested even upon a debt which is not affected by the bankruptcy during the entire period from the adjudication until his discharge, or, if he is not discharged, until the time limited for his discharge has expired.<sup>6</sup>

**§ 489. Declaration and payment of dividends.**—"(*a*) Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured. (*b*) The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed

<sup>4</sup>G. O. xii. As to the date when the jurisdiction of the referee attaches, see *In re Florcken*, 107 Fed. R. 241.

<sup>5</sup>G. O. xxx.

<sup>6</sup>*In re Lewensohn*, 99 Fed. R. 73. But see *In re Baker*, 96 Fed. R. 954.

An injunction against the prosecution of a suit against a surety upon the bankrupt's bail bond was not granted when his personal liberty was not threatened. *In re Franklin*, 106 Fed. R. 668.

equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order. (c) The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends. (d) Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts. (e) A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.”<sup>1</sup>

“(a) Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. (b) Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends.”<sup>2</sup>

§ 490. Compositions.—“(a) A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his cred-

§ 489. <sup>1</sup> 30 St. at L. 544, 563, § 65.

creditor fails to prove his claim until  
<sup>2</sup> 30 St. at L. 544, 563, § 66. For a after a dividend has been paid, it  
definition of a dividend, see *In re* seems that he can only claim to  
Barber, 97 Fed. R. 547. For claims share *pro rata* in those subsequently  
to interest on dividends, see *Hersey* paid. *In re* Stein, 94 Fed. R. 124;  
*v. Fosdick*, 20 Fed. R. 44. Where a *In re* Scott, 96 Fed. R. 607.

itors, required to be filed by bankrupts. (b) An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. (c) A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. (d) The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.”<sup>1</sup>

“(a) The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.”<sup>2</sup>

The court will refuse to confirm the composition when the bankrupt has failed to make a deposit sufficient to pay the cost of the proceedings.<sup>3</sup> It has been held that the composition must be offered to all the creditors, not merely to all whose claims have been allowed; that otherwise it may be disapproved,

§ 490. <sup>1</sup> 30 St. at L. 544, 549, § 12.  
See *Ross v. Saunders* (C. C. A.), 105  
Fed. R. 915; *In re Hilborn*, 104 Fed.  
R. 866.

<sup>2</sup> 30 St. at L. 544, 550, § 13.

<sup>3</sup> *In re Rider*, 96 Fed. R. 808.

when accepted by a majority of those who had proved their claims when it was offered, but not by a majority of those whose claims have been allowed when the application for confirmation is made;<sup>4</sup> that an erroneous statement of the address of a creditor made in the schedules in good faith is no reason for setting aside the confirmation of the composition, although the creditor had no notice of the proceedings and his claim was not included in the composition;<sup>5</sup> that a secret agreement made before the composition, that one creditor shall receive more than the other, is a fraud, which cannot be enforced,<sup>6</sup> which is not a ground for relieving the promisee from the legal consequences of his failure to prove his claim,<sup>7</sup> and for which the composition may be set aside;<sup>8</sup> that the trustee may remove any property that has been in pursuance thereof conveyed to the creditor, even if part of the consideration was his assistance in procuring the consent of other creditors by the purchase of their claims and otherwise;<sup>9</sup> that an order setting aside a composition should not be granted without notice to all the creditors who have consented to the same;<sup>10</sup> and that the absence of fraud in a creditor who assents to a composition releases his claim for damages caused by a breach of a contract, of which breach he then was ignorant.<sup>11</sup>

**§ 491. Discharge of bankrupts.**—“(a) Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, the expiration of the next six months. (b) The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at

<sup>4</sup> Ibid.

<sup>5</sup> In re Rudnick, 98 Fed. R. 787.

<sup>6</sup> Brownsville Mfg. Co. v. Lockwood, 11 Fed. R. 705; In re Starr, 56 Fed. R. 142; Fairbanks v. Amoskeag Nat. Bank, 88 Fed. R. 630; Cavanna v. Bassett, 8 Fed. R. 215.

<sup>7</sup> In re Starr, 56 Fed. R. 142.

<sup>8</sup> Brownsville Mfg. Co. v. Lockwood, 11 Fed. R. 705.

<sup>9</sup> Fairbanks v. Amoskeag Nat. Bank, 88 Fed. R. 630.

<sup>10</sup> In re Dunn, 53 Fed. R. 341. As to the rights of secured creditors upon a composition, see Flower v. Greenbaum, 50 Fed. R. 190.

<sup>11</sup> Fowle v. Park, 48 Fed. R. 789.



such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained. (c) The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.”<sup>1</sup>

“The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.”<sup>2</sup>

“The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.”<sup>3</sup>

“A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.”<sup>4</sup>

“(a) A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use,

§ 491. 180 St. at L. 544, 550, § 14.  
As to time, see *In re Wolff*, 100 Fed.  
R. 480; *In re Wheeler*, 5 Fed. R. 299.

<sup>2</sup> 80 St. at L. 544, 550, § 15.  
<sup>3</sup> 80 St. at L. 544, 550, § 16.  
<sup>4</sup> 80 St. at L. 544, 550, § 17.

embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee. (b) A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings. (c) A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do. (d) A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.”<sup>6</sup>

“The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.”<sup>6</sup>

“A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification

<sup>5</sup> 80 St. at L. 544, 554, § 29.

<sup>6</sup> G. O. xxxi.

in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."<sup>7</sup>

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."<sup>8</sup>

The separate petition for his discharge by a member of a bankrupt firm should recite the former proceedings by and against the partnership and pray for his separate discharge.<sup>9</sup> The notice to the creditors should advise them of the same.<sup>10</sup> Defects in the form of the original petition in bankruptcy may then be amended *nunc pro tunc*.<sup>11</sup> It has been held that the specifications of the objecting creditors must be as specific as a criminal indictment or information;<sup>12</sup> that they must be clear, specific, circumstantial, and distinctly allege one of the statutory grounds for refusing the discharge;<sup>13</sup> that they must

<sup>7</sup> G. O. xxxii.

<sup>8</sup> G. O. xii.

<sup>9</sup> In re Meyers, 97 Fed. R. 757.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> In re Hirsch, 96 Fed. R. 468. But see In re Kaiser, 99 Fed. R. 689, which, however, holds a specification defective because it failed to allege that the concealment of property by the bankrupt was made "knowingly and fraudulently." In re Mudd, 105 Fed. R. 348; In re Adams, 104 Fed. R. 72; In re Pierce, 103 Fed. R. 64. The allegation that the bankrupt had "not offered to surrender his property for the benefit of all his creditors," and was "withholding property from his creditors," was held insufficient. In re Hirsch, 99 Fed. R. 468.

<sup>13</sup> In re Frice, 96 Fed. R. 611. A specification that he had concealed from the assignee "certain papers" relating to judgments obtained against him prior to adjudication

was held to be insufficient. In re Carrier, 47 Fed. R. 438. So was a specification that he had, for the purpose of preventing his property from coming into the hands of his assignee, suffered certain judgments to be entered against him upon notes and checks which had previously been paid, there being no allegations that the judgments were collected from the estate in bankruptcy. Ibid. It was held under the Act of 1867, that a specification of a failure to keep proper books of account could not sustain a finding that the books were kept upon an incorrect theory. In re Graves, 24 Fed. R. 550. That allegations that he did not keep some necessary books, and that the books kept were insufficient to show the course or condition of his business, did not justify the objection that some particular transactions were not entered. In re Smith, 16 Fed. R. 465. And that a creditor who had filed specifications only in his capac-

set forth the particular facts on which the opposition is based,<sup>14</sup> not be vague, nor general, nor contain mere conclusions of law,<sup>15</sup> and that they must not be made upon belief.<sup>16</sup>

A creditor may oppose the discharge although he has not proved his claim.<sup>17</sup>

The specifications may be once amended by permission of the judge,<sup>18</sup> but not, it has been held, by permission of the referee alone.<sup>19</sup> Where an appearance is duly entered by an objecting creditor, the judge may enlarge his time to file specifications or allow them to be filed *nunc pro tunc*.<sup>20</sup> The judge may refer the hearing upon the objections to a referee, either in his official capacity or as a special United States commissioner, to take the evidence and report his findings and recommendations.<sup>21</sup> It has been held that the referee has power to rule upon the sufficiency of the specifications, and that he should exclude evidence offered in support of specifications that are clearly defective.<sup>22</sup> The proceedings were stayed pending the determination of the questions raised by a creditor who asserted rights against property claimed by the bankrupt to be exempt,<sup>23</sup> and the re-allotment of a homestead;<sup>24</sup> but not pending an action brought by creditors in a State court to set aside a transfer of property by him as fraudulent,<sup>25</sup> although a judgment in such a case, if the issues were identical, would be

ity as a creditor of an individual partner could not offer evidence as to defects in the books of the firm, although he was also a firm creditor. In re Smith, 16 Fed. R. 465.

<sup>14</sup> In re Hixon, 98 Fed. R. 440. The allegations that the bankrupt has "concealed a part of his effects from the court," and has, "in contemplation of becoming bankrupt, made payments, transfers and assignments of his property for the purpose of preferring a creditor," are insufficient. Ibid. So was held to be the allegation that he, "with a fraudulent intent, has failed to include in his schedules property belonging to him." In re Adams, 104 Fed. R. 72.

<sup>15</sup> In re Holman, 92 Fed. R. 512.

<sup>16</sup> In re Thomas, 92 Fed. R. 912.

<sup>17</sup> In re Frice, 96 Fed. R. 611.

<sup>18</sup> In re Holman, 92 Fed. R. 512. See In re Mudd, 105 Fed. R. 848. Leave to amend after the proofs were closed was denied. In re Smith, 16 Fed. R. 465. But see In re Pierce, 103 Fed. R. 64.

<sup>19</sup> In re Kaiser, 99 Fed. R. 689.

<sup>20</sup> In re Frice, 96 Fed. R. 611.

<sup>21</sup> In re Kaiser, 99 Fed. R. 689; In re Meyers, 100 Fed. R. 775. Notice of the application must be given to the trustee or creditors. In re Sykes, 106 Fed. R. 669. By D. C. S. D. N. Y. Rule XI, the application must be filed with the referee, who notifies creditors and certifies the proceedings to the clerk.

<sup>22</sup> In re Kaiser, 99 Fed. R. 689.

<sup>23</sup> In re Woodruff, 96 Fed. R. 317.

<sup>24</sup> In re McBryde, 99 Fed. R. 686.

<sup>25</sup> In re Cornell, 97 Fed. R. 29.

conclusive evidence of the same facts between the same parties upon the application for a discharge.<sup>26</sup> It seems that the rules concerning the admission and exclusion of testimony taken upon a former trial of the same action apply to testimony taken upon a former unsuccessful application for a discharge in the same bankruptcy proceedings.<sup>27</sup> The burden of proof is upon the objecting creditors to support their specifications;<sup>28</sup> but when they have made out a *prima facie* case, such as the existence of assets and their disappearance a short time before the institution of the proceedings in bankruptcy, the burden is shifted to the bankrupt, who must then explain the facts which are peculiarly within his knowledge, or else his discharge will be refused.<sup>29</sup> A discharge will not be denied because of an omission of assets from the bankrupt's schedules caused by inadvertence or a mistake of fact or law;<sup>30</sup> nor, it has been held, because of the omission of a leasehold where there is no evidence that it has any value,<sup>31</sup> or because of the omission of an interest in property which has been pledged, when there is no evidence that it is worth more than the debt due the pledgee,<sup>32</sup> or for a failure to keep books before the passage of the Bankruptcy Law,<sup>33</sup> or for the failure of his agent to keep books;<sup>34</sup> nor, it has been said, for acts done in contemplation of insolvency but not in contemplation of bankruptcy.<sup>35</sup> But an intentional concealment of property,<sup>36</sup> or of books of

<sup>26</sup> In re Skinner, 97 Fed. R. 190.

<sup>27</sup> In re Brockway, 12 Fed. R. 69.

<sup>28</sup> In re Wetmore, 99 Fed. R. 703; In re De Leeuw, 98 Fed. R. 408; In re Idzall, 96 Fed. R. 314; In re Hirsch, 96 Fed. R. 468; In re Dews, 96 Fed. R. 181; In re Freund, 98 Fed. R. 81; In re Cornell, 97 Fed. R. 29; In re Corn, 106 Fed. R. 143; In re Gaylord, 106 Fed. R. 883.

<sup>29</sup> In re Meyers, 96 Fed. R. 408; In re Wood, 98 Fed. R. 972; In re O'Gara, 97 Fed. R. 932; In re Ablowich, 99 Fed. R. 81. But see In re Idzall, 96 Fed. R. 314.

<sup>30</sup> In re Morrow, 97 Fed. R. 574; In re Crenshaw, 95 Fed. R. 632; In re Hirsch, 96 Fed. R. 468; In re Wetmore, 99 Fed. R. 703; In re Scott, 11 Fed. R. 133; In re McAdam, 98 Fed.

R. 409; In re McBryde, 99 Fed. R. 686.

<sup>31</sup> In re Hirsch, 97 Fed. R. 571.

<sup>32</sup> In re Hirsch, 96 Fed. R. 468.

<sup>33</sup> In re Hirsch, 96 Fed. R. 468; In re Shorer, 96 Fed. R. 90; Sellers v. Bell (C. C. A.), 94 Fed. R. 801; In re Phillips, 98 Fed. R. 844. Cf. In re Idzall, 96 Fed. R. 314; In re Stark, 96 Fed. R. 88. But see In re Ablowich, 99 Fed. R. 81.

<sup>34</sup> In re Hyman, 97 Fed. R. 195.

<sup>35</sup> In re Carmichael, 96 Fed. R. 594; In re Webb, 98 Fed. R. 404. But a concealment of assets from a State receiver was held to be equivalent to their concealment from the trustee in bankruptcy. In re Lesser, 108 Fed. R. 205.

<sup>36</sup> In re Skinner, 97 Fed. R. 190; In

account,<sup>37</sup> or a wilful refusal to explain clearly the condition and situation of his assets,<sup>38</sup> is a ground for the refusal of a bankrupt's discharge.

The discharge will not be refused because the debt due the objecting creditor will not be thereby released.<sup>39</sup> The court has the power to deny a discharge upon a ground not stated in the specifications of the objecting creditors;<sup>40</sup> but it may refuse to do so.<sup>41</sup> The order or certificate of discharge should be general in its nature, and not be so drawn as to except from its operation debts excepted by the statute.<sup>42</sup> The certificate of discharge should be withheld until the expiration of ten days from the order, or such further time as may be allowed the creditors for an appeal.<sup>43</sup> A discharge may be revoked because of the subsequent discovery of articles fraudulently concealed by the bankrupt;<sup>44</sup> and because of a withdrawal without notice for a consideration of objections filed by certain creditors upon whose opposition the others relied.<sup>45</sup> A discharge in bankruptcy does not release a debt caused by fraudulent and material misrepresentations,<sup>46</sup> or contracted when the debtor knew that he was insolvent and intended not to pay it;<sup>47</sup> nor the obligation to pay alimony, whether in arrears at the time of the adjudication or afterwards falling due.<sup>48</sup> It

re Kamsler, 97 Fed. R. 194; In re Roy, 96 Fed. R. 400; In re Lewin, 103 Fed. R. 852; In re Becker, 106 Fed. R. 54; In re Lowenstein, 106 Fed. R. 51; In re Bemis, 104 Fed. R. 672. It seems that money borrowed to pay the expenses of the bankruptcy proceedings need not be put in the schedules. *Sellers v. Bell* (C. C. A.), 94 Fed. R. 801.

<sup>37</sup> In re Ablowich, 99 Fed. R. 81. Cf. In re Warne, 10 Fed. R. 877; In re Kamsler, 97 Fed. R. 194; In re Bragasa, 103 Fed. R. 936; *Bragassa v. St. Louis Cycle Co.* (C. C. A.), 107 Fed. R. 77; In re Bemis, 104 Fed. R. 672; *Ablowich v. Stursberg*, 103 Fed. R. 751; In re Spear, 103 Fed. R. 779; In re Corn, 106 Fed. R. 143.

<sup>38</sup> In re Walther, 95 Fed. R. 941.

<sup>39</sup> In re Black, 97 Fed. R. 493; In re Thomas, 92 Fed. R. 912.

<sup>40</sup> In re Marshall Paper Co., 95 Fed. R. 419.

<sup>41</sup> In re Thomas, 92 Fed. R. 912; In re Hixon, 93 Fed. R. 440; In re Adams, 104 Fed. R. 72.

<sup>42</sup> In re Mussey, 99 Fed. R. 71.

<sup>43</sup> In re Hirsch, 96 Fed. R. 468.

<sup>44</sup> In re Meyers, 100 Fed. R. 775.

<sup>45</sup> In re Dietz, 97 Fed. R. 563.

<sup>46</sup> *Forsyth v. Vehmeyer*, 177 U. S. 177; *Packer v. Whittier* (C. C. A.), 91 Fed. R. 511. But see In re Rhutassel, 96 Fed. R. 597.

<sup>47</sup> *Ames v. Moir*, 138 U. S. 806.

<sup>48</sup> *Audubon v. Shufeldt*, 181 U. S. 575. So of a judgment or order in bastardy proceedings. In re Baker, 96 Fed. R. 954. As to its effect upon a wife's rights in her husband's property in Louisiana, see *Fleitas v. Richardson*, 147 U. S. 550.



has been held that the discharge releases a debt due by a stock broker or factor for the conversion of the property of his principal.<sup>49</sup> It has been said that a judgment in an action for criminal conversation with the plaintiff's wife<sup>50</sup> and a judgment for a breach of a promise of marriage,<sup>51</sup> may be discharged; but that a judgment for seduction cannot;<sup>52</sup> that an unliquidated debt may be discharged;<sup>53</sup> that the discharge of a corporation will not release its directors or stockholders from any liability that they may have incurred;<sup>54</sup> that a limited judgment may be taken for that purpose against the corporation;<sup>55</sup> but that otherwise a corporation is entitled to as complete a discharge as an individual.<sup>56</sup>

**§ 492. Costs and fees.**—The courts of bankruptcy have power “to tax costs wherever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties and estates in proceedings in bankruptcy.”<sup>1</sup> When a petition in involuntary bankruptcy is “dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.”<sup>2</sup> “In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.”<sup>3</sup>

“Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such

<sup>49</sup> *Chapman v. Forsyth*, 2 How. 202; *Hennequin v. Clews*, 111 U. S. 676; *Palmer v. Hussey*, 119 U. S. 96. But see *Bracken v. Milner*, 104 Fed. R. 522. For a case where a trustee was discharged, see *Upshur v. Briscoe*, 138 U. S. 365.

<sup>50</sup> *In re Tinker*, 99 Fed. R. 79.

<sup>51</sup> *In re McCauley*, 101 Fed. R. 223.

<sup>52</sup> *In re Maples*, 105 Fed. R. 919.

<sup>53</sup> *In re Hilton*, 104 Fed. R. 981.

<sup>54</sup> *In re Marshall Paper Co.*, 95 Fed. R. 419.

<sup>55</sup> *In re Marshall Paper Co. (C. C. A.)*, 102 Fed. R. 872.

<sup>56</sup> *Ibid.*

§ 492. <sup>1</sup> 30 St. at L. 544, 546, § 2; *In re Carolina Cooperage Co.*, 96 Fed. R. 604.

<sup>2</sup> 30 St. at L. 544, 547, § 2.

<sup>3</sup> G. O. xxxiv.

other fees as may be received for certified copies of record which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they had been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.”<sup>4</sup>

“(a) Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except where a fee is not required from a voluntary bankrupt.<sup>5</sup> (b) Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.”<sup>6</sup>

“The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.”<sup>7</sup>

“In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge,

<sup>4</sup> 80 St. at L. 544, 558, 559, § 51.

<sup>5</sup> 80 St. at L. 544, 559, § 52.

<sup>6</sup> 80 St. at L. 544, 559, § 52; *supra*, § 332; In re Woodard, 95 Fed. R. 955;

In re Scott, 99 Fed. R. 404; In re Adams Sartorial Art Co., 101 Fed. R. 215; In re Damon, 104 Fed. R. 775.

<sup>7</sup> 80 St. at L. 544, 562, § 62.

at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.”<sup>8</sup>

“Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.”<sup>9</sup> The costs of administration include the fees and mileage of witnesses,<sup>10</sup> “and one reasonable attorney’s fee, for the professional services actually rendered, irrespective of the number of attorneys employed to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow.”<sup>11</sup>

“(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on all sums to be paid

<sup>8</sup> G. O. xxxv.

<sup>9</sup> G. O. x.

<sup>10</sup> 30 St. at L. 544, 563, § 64; In re Carolina Cooperage Co., 96 Fed. R. 604; *supra*, § 333.

<sup>11</sup> 30 St. at L. 544, 563, § 64; In re Curtis (C. C. A.), 100 Fed. R. 784; In re Matthews, 97 Fed. R. 772; In re Kross, 96 Fed. R. 816; In re Woodard, 95 Fed. R. 955; In re Carolina Cooperage Co., 96 Fed. R. 950; In re J. W. Harrison Mercantile Co., 95 Fed. R. 123; In re Silverman, 97 Fed. R. 325; In re Burrus, 97 Fed. R. 926; In re Michel, 95 Fed. R. 803; In re Mayer, 101 Fed. R. 695; In re Terrill, 103 Fed.

R. 781; In re Anderson, 103 Fed. R. 854; In re Beck, 92 Fed. R. 889.

Where an attorney for a creditor has rendered beneficial services to the estate in a case where the attorney for the trustee has refused to act, or there is no attorney for the trustee, the court may allow him compensation out of the assets. In re Little River Lumber Co., 101 Fed. R. 558. The attorney for a creditor has a lien upon his client’s share in the assets which may be liquidated and confirmed by the court with or without a jury trial. In re Rude, 101 Fed. R. 805.

as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition. (b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees. (c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commission shall be paid to the referee.”<sup>12</sup>

“(a) Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars. (b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. (c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.”<sup>13</sup>

**§ 493. Jurisdiction in bankruptcy of the Circuit Courts.—**The Circuit Courts of the United States have no jurisdiction in bankruptcy. They “have jurisdiction of all controversies at

<sup>12</sup> 30 St. at L. 544, 556, § 40. See *In re Carolina Cooperage Co.*, 96 Fed. R. 950; *In re Ft. Wayne, etc. Corp.*, 94 Fed. R. 109; *In re Barber*, 97 Fed. R. 547; *In re Tebo*, 101 Fed. R. 419; *In re Troth*, 104 Fed. R. 291.

<sup>13</sup> 30 St. at L. 544, 557, 558, § 48; *In re T. L. Kelly Dry Goods Co.*, 102 Fed. R. 747. It has been said that it is the duty of the creditors to elect an attorney for the trustee at the meeting where the trustee is

chosen; and that if they fail to do so the referee may authorize the trustee to employ one. *In re Little River Lumber Co.*, 101 Fed. R. 558. As to the compensation of the attorney for the trustee, see *Meddaugh v. Wilson*, 151 U. S. 338; *In re Stotts*, 93 Fed. R. 438; *In re Treadwell*, 23 Fed. R. 442; *In re Cook*, 17 Fed. R. 328; *In re Barnes*, 18 Fed. R. 158. As to fees of receivers in bankruptcy, see *In re Scott*, 99 Fed. R. 404.

law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.”<sup>1</sup> That is to say, they take jurisdiction of such cases either originally or upon removal, where the matter in dispute exceeds, exclusive of interest and cost, the sum or value of \$2,000, and which arise under the Constitution or laws of the United States, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there is a controversy between citizens of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, or, irrespective of the value of the matter in dispute, where there is a controversy between citizens of the same State claiming lands under grants of different States.<sup>2</sup>

**§ 494. Review by Circuit Courts of Appeals.**—The Circuit Courts of Appeals and the Supreme Courts of the Territories are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the “courts of bankruptcy from which they have appellate jurisdiction in other cases.”<sup>1</sup> “Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.”<sup>2</sup> “The several Circuit

<sup>1</sup> § 493. 130 St. at L. 544, 552, § 28.

<sup>2</sup> 25 St. at L. 483; *supra*, §§ 15–23. Where an adverse claimant recovered judgment in a Circuit Court, which had jurisdiction by reason of citizenship, against a trustee in bankruptcy for the possession of specific property, and it then was shown for

the first time that the trustee had sold part of the property pending the suit, it was held that the Circuit Court should order the trustee to pay the proceeds to the plaintiff, and that it was error to remit him to an application to the District Court. *J. B. McFarlan Carriage Co. v. Solanas*

Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."<sup>3</sup> "Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."<sup>4</sup>

It seems that Circuit Courts of Appeals may review the decisions of the District Courts in bankruptcy in three ways: by writ of error, by appeal, and by summary supervision. It has been held that an adjudication in bankruptcy which is tried by a jury is reviewed by writ of error.<sup>5</sup> An order directing the payment of a counsel fee to an attorney for petitioning creditors,<sup>6</sup> or for a lienor,<sup>7</sup> is an order allowing a claim and is appealable to the Circuit Court of Appeals. It has been held that an order refusing confirmation of a composition is appealable to the Circuit Court of Appeals as an order denying a discharge.<sup>8</sup> An appeal is the only method in which a review may be obtained of the facts as well as the law.<sup>9</sup> It has been held that the appellate court, upon an appeal from an order allow-

(C. C. A.), 106 Fed. R. 145. Subsequently the Circuit Court allowed an intervention by a stranger with a lien upon the fund, which it enforced. *McFarland Carriage Co. v. Solanes*, 108 Fed. R. 582.

§ 494. 180 St. at L. 553, § 24.

<sup>3</sup> *Ibid.*, § 25.

<sup>4</sup> *Ibid.*, § 24. For appeals to the Court of Appeals of the District of Columbia, see D. C. Code, § 226; *supra*, § 18.

<sup>5</sup> G. O. xxxvi.

<sup>6</sup> *Duncan v. Landis* (C. C. A.), 106 Fed. R. 889. Where the only issue upon an adjudication of involuntary bankruptcy was whether the creditors were estopped from filing the pe-

tition, and no jury was asked for, it was held that the proper method of review was by appeal. *Simonson v. Sinsheimer* (C. C. A.), 100 Fed. R. 426.

<sup>7</sup> *In re Curtis* (C. C. A.), 100 Fed. R. 784.

<sup>8</sup> *In re Roche* (C. C. A.), 101 Fed. R. 956.

<sup>9</sup> *U. S. v. Hammond* (C. C. A.), 104 Fed. R. 862. *Contra*, *In re Adler*, 103 Fed. R. 444. *Cf.* *In re Rouse, Hazard & Co.* (C. C. A.), 91 Fed. R. 96.

<sup>10</sup> *Simonson v. Sinsheimer* (C. C. A.), 100 Fed. R. 426; *Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co.* (C. C. A.), 101 Fed. R. 699; *In re Eggert* (C. C. A.), 102 Fed. R. 785; *In re Whitener* (C. C. A.), 105 Fed. R. 180.



ing or disallowing a claim, may determine the extent of the claimant's lien and of his priority of payment.<sup>10</sup>

It has been held that no appeal will lie from an order enjoining the prosecution of a suit of replevin and referring the plaintiff's claim to a referee,<sup>11</sup> nor from an order requiring a bankrupt to indorse a license,<sup>12</sup> nor from an order directing a trustee to return property to an adverse claimant,<sup>13</sup> or granting or denying a motion that an adverse claimant deliver property to a trustee.<sup>14</sup> It seems that all such orders and a ruling upon the examination of a witness<sup>15</sup> can only be immediately reviewed by a Circuit Court of Appeals upon a petition for a supervision; and not then when a question of fact is involved,<sup>16</sup> and there is no clear abuse of discretion.<sup>17</sup> It seems that a petition for revision will only lie in cases where there can be no appeal.<sup>18</sup> A similar supervisory jurisdiction was vested by the act of 1867 in the Circuit Courts,<sup>19</sup> and the decisions thereupon may be consulted with profit. A party may file a petition for a review concurrently with an appeal, and the Circuit Court of Appeals may determine the matters thus brought before it in either or both proceedings as it may deem appropriate.<sup>20</sup> It has been held that under special circumstances an appeal upon which all of the parties have appeared may be treated as a petition for a review.<sup>21</sup> The Circuit Court of Appeals for the Eighth

<sup>10</sup> *Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co.* (C. C. A.), 101 Fed. R. 699; *Cunningham v. German Ins. Bank* (C. C. A.), 103 Fed. R. 932. *Contra*, *In re Worcester County* (C. C. A.), 102 Fed. R. 808, which holds that so much of the order as allows the item must be reviewed by appeal, and so much as determines the right of the claimant to priority must be reviewed by petition.

<sup>11</sup> *In re Russell*, 101 Fed. R. 228, 248.

<sup>12</sup> *Fisher v. Cushman* (C. C. A.), 105 Fed. R. 860.

<sup>13</sup> *In re Whitener* (C. C. A.), 105 Fed. R. 180. *Cf.* *In re Seebold* (C. C. A.), 105 Fed. R. 910.

<sup>14</sup> *In re Abraham* (C. C. A.), 98 Fed. R. 767; *In re Seebold* (C. C. A.), 105 Fed. R. 910.

<sup>15</sup> *In re Horgan* (C. C. A.), 98 Fed. R. 414.

<sup>16</sup> *In re Whitener* (C. C. A.), 105 Fed. R. 180; *In re Rosser* (C. C. A.), 101 Fed. R. 562; *Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co.* (C. C. A.), 101 Fed. R. 699. Such was held to be the finding that a creditor did not have reasonable ground to believe that his debtor was insolvent when he obtained security. *In re Eggert* (C. C. A.), 102 Fed. R. 735.

<sup>17</sup> *In re Horgan* (C. C. A.), 98 Fed. R. 414.

<sup>18</sup> *In re Eggert* (C. C. A.), 102 Fed. R. 735.

<sup>19</sup> U. S. R. S., § 4986.

<sup>20</sup> *In re Worcester County* (C. C. A.), 102 Fed. R. 808; *Fisher v. Cushman* (C. C. A.), 103 Fed. R. 860.

<sup>21</sup> *In re Abrahams* (C. C. A.), 98 Fed. R. 767.

courts of the Indian Territory sitting as courts of bankruptcy.<sup>22</sup> The phrase "within their jurisdiction," in the grant of supervisory power to the Circuit Court of Appeals, means within their territorial jurisdiction; and they may upon a petition for Circuit has no supervisory jurisdiction over the United States a review reverse an order of a District Court in bankruptcy when an objection to the jurisdiction was made below, if that was not the only objection, and the court did not ground its decision upon a want of jurisdiction.<sup>23</sup>

An appeal from an adjudication of involuntary bankruptcy may be taken by contesting creditors.<sup>24</sup> An appeal from the allowance of a claim may be taken by the trustee,<sup>25</sup> and if he refuses, to take it by an objecting creditor,<sup>26</sup> although it is the safer practice for the creditor to obtain permission to appeal in the name of the trustee.<sup>27</sup> The trustee must be made a party to an appeal by a claimant from an order disallowing his claim, even if no contest was made by the trustee below;<sup>28</sup> but it has been held that persons who were not parties to the record, to whom allowances have been made for fees and disbursements at the petition of the trustee, need not be made parties to an appeal from the order for such allowances.<sup>29</sup>

Appeals to the Circuit Courts of Appeals from judgments which refuse to adjudge the defendant a bankrupt, which grant or deny a discharge, and which allow or reject a claim, must be taken within ten days from the time the judgment has been rendered.<sup>30</sup> Appeals in these courts in other cases must be taken within six months after the entry of the judgment or order sought to be reviewed.<sup>31</sup> It has been held that a peti-

<sup>22</sup> *In re Blair* (C. C. A.), 106 Fed. R. 662.

<sup>23</sup> *In re Seebold* (C. C. A.), 105 U. S. 910; *Bryan v. Bernheimer*, 181 U. S. 188.

<sup>24</sup> *In re Meyer* (C. C. A.), 98 Fed. R. 976.

<sup>25</sup> *In re Curtis* (C. C. A.), 100 Fed. R. 784; *Chatfield v. O'Dwyer* (C. C. A.), 101 Fed. R. 797.

<sup>26</sup> *McDaniel v. Stroud* (C. C. A.), 106 Fed. R. 486; *Chatfield v. O'Dwyer* (C. C. A.), 101 Fed. R. 797.

<sup>27</sup> *Chatfield v. O'Dwyer* (C. C. A.),

101 Fed. R. 486. *In re Roche* (C. C. A.), 101 Fed. R. 956, holds that any creditor may appeal in his own name.

<sup>28</sup> *Ex parte Mead*, 109 U. S. 230; *Mead v. Platt*, 17 Fed. R. 509.

<sup>29</sup> *In re Utt* (C. C. A.), 105 Fed. R. 754.

<sup>30</sup> 30 St. at L. 544, 553, § 25; *Norcross v. Nave & McCord Merc. Co.* (C. C. A.), 101 Fed. R. 796.

<sup>31</sup> 26 St. at L. 829, § 11; *Boonville Nat. Bank v. Blakey* (C. C. A.), 107 Fed. R. 891; *infra*, § 506.

tion for a revision may and must be filed within six months from the ruling, order or decree of which complaint is made.<sup>32</sup> The appeal is not taken until the order allowing the same is filed in the clerk's office of the District Court.<sup>33</sup> It has been held that filing the bond within that time is insufficient when there was a formal written appeal.<sup>34</sup> Where the trustee had without culpable neglect failed to take an appeal in time, the court granted him a rehearing in order to allow him to appeal.<sup>35</sup>

An assignment of errors must be filed or else there may be an affirmance without a consideration of the merits of the appeal.<sup>36</sup> Evidence taken before the referee which was not submitted to the judge should not be included in the transcript.<sup>37</sup> "Trustees shall not be required to give bond when they take appeals or sue out writs of error."<sup>38</sup> The practice upon an appeal in bankruptcy is otherwise similar to that upon an appeal in equity,<sup>39</sup> which is hereinafter explained.<sup>40</sup>

The original petition for a revision should be filed in the Circuit Court of Appeals and not in the District Court.<sup>41</sup> It must clearly state the questions of law involved so as to present a distinct issue, and be accompanied by enough of the record to show the manner in which the question arose.<sup>42</sup> It is the safer practice to procure the allowance of such a petition, as if it were an appeal, *ex parte* by a judge of the District Court or of the Circuit Court of Appeals, and reasonable notice of the filing and hearing should be given to the adverse parties.<sup>43</sup>

<sup>32</sup> In re Worcester County (C. C. A.), 102 Fed. R. 808; Sleete v. Buel (C. C. A.), 104 Fed. R. 968; In re N. Y. Economical Pr. Co. (C. C. A.), 106 Fed. R. 839; In re Beck, 81 Fed. R. 554.

<sup>33</sup> Norcross v. Nave & McCord Merc. Co. (C. C. A.), 101 Fed. R. 796; *infra*, § 506.

<sup>34</sup> Ibid.

<sup>35</sup> In re Wright, 96 Fed. R. 820. But see Judson v. Courier Co., 25 Fed. R. 705.

<sup>36</sup> In re Dunning (C. C. A.), 94 Fed. R. 709; Lloyd v. Chapman (C. C. A.), 93 Fed. R. 599; *infra*, § 507.

<sup>37</sup> Cunningham v. German Ins. Bank (C. C. A.), 103 Fed. R. 932.

<sup>38</sup> 30 St. at L. 544, 554, § 25.

<sup>39</sup> G. O. xxxvi.

<sup>40</sup> *Infra*, ch. xxxviii.

<sup>41</sup> In re Williams (C. C. A.), 105 Fed. R. 906.

<sup>42</sup> Courier-Journal Job Pr. Co. v. Schaefer-Meyer Br. Co. (C. C. A.), 101 Fed. R. 609; In re Baker (C. C. A.), 104 Fed. R. 287; In re Richards (C. C. A.), 96 Fed. R. 935.

<sup>43</sup> In re Abraham (C. C. A.), 93 Fed. R. 767.

**§ 495. Review by the Supreme Court of the United States.** The Supreme Court of the United States is "invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia."<sup>1</sup>

"From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or 2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."<sup>2</sup>

"Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."<sup>3</sup>

The Supreme Court cannot review a decision of a District or Circuit Court upon a certificate that there is a question of jurisdiction, until after final judgment.<sup>4</sup>

§ 495. <sup>1</sup> 80 St. at L. 544, 553, 554, § 24.

<sup>2</sup> 80 St. at L. 544, 554, § 25. See *infra*, §§ 497, 498, 499.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Bardes v. Hawarden Nat. Bank*, 175 U. S. 526; *infra*, § 498. It seems that for the purposes of a review in this method, the different applications in bankruptcy are all treated as parts of the same proceeding, and that there can be no review of any of them by the Supreme Court of

the United States upon a certificate of jurisdiction until after the bankrupt's discharge. See *Leggett v. Allen*, 110 U. S. 741; *Ingersoll v. Bonroe*, 154 U. S. 645. But where a claimant or the trustee proceeds by an original bill in equity filed in a District or Circuit Court of the United States, the Supreme Court may review the final decree in that suit upon a certificate that there is a question of jurisdiction. In *re Jacobs* (C. C. A.), 99 Fed. R. 532.

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ."<sup>5</sup>

Under this statute the Supreme Court may review the final judgments or decrees of a State court which refuse to give proper effect to a discharge in bankruptcy;<sup>6</sup> which refuse to give proper effect to the statute of limitations as to suits against trustees;<sup>7</sup> and which refuse to give proper effect to an order for a sale in bankruptcy;<sup>8</sup> but not of a judgment or decree which erroneously gives too great effect to a discharge;<sup>9</sup> nor of a refusal to open a decree so as to allow a defendant to plead a discharge.<sup>10</sup> It seems that the time within which a

<sup>5</sup> U. S. R. S., § 709; *infra*, § 500.

<sup>9</sup> *Linton v. Stanton*, 12 How. 423.

<sup>6</sup> *Dimock v. Revere Copper Co.*, 117 U. S. 559; *Forsyth v. Vehmeyer*, 177 U. S. 177; *Palmer v. Hussey*, 119 U. S. 96. See *Winchester v. Heiskell*, 119 U. S. 450.

<sup>10</sup> *Wolf v. Stix*, 96 U. S. 991. But see *Winchester v. Heiskell*, 119 U. S. 450. See also *Van Norden v. Benner*, 131 U. S. cxlv; *Scott v. Kelly*, 23 Wall. 57; *Boatmen's Sav. Bank v. State Sav. Ass'n*, 114 U. S. 265. Under the act of 1867 it was held that the Supreme Court might review in certain cases the decision of a State

<sup>7</sup> *Traer v. Clews*, 115 U. S. 528.

<sup>8</sup> *Factors' & Tr. Ins. Co. v. Murphy*, 111 U. S. 738; *New Orleans S. F. & L. Co. v. Delamore*, 114 U. S. 501.

writ of error to a judgment or decree of a State court may be obtained from the Supreme Court of the United States or an appeal taken thereto from a District or Circuit Court of the United States, or from the Supreme Court of a Territory, or of the District of Columbia, is two years from the entry of the same, in bankruptcy as in other cases;<sup>11</sup> but where the appeal is taken solely because a question of jurisdiction was at issue in a case in a Circuit or District Court, such question must be certified at the term at which the judgment or decree was entered.<sup>12</sup>

court against an assignee in bankruptcy who claimed title to certain property. *Williams v. Heard*, 140 U. S. 529. But see *McKenna v. Simpson*, 129 U. S. 506.

<sup>11</sup> U. S. R. S., § 1008; *infra*, § 506.

<sup>12</sup> 26 St. at L. 827; *infra*, § 497; *Colvin v. City of Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687; *infra*, § 498.



## CHAPTER XXXIII.

### WRITS OF ERROR AND APPEALS.

§ 496. **Writs of error and appeals in general.**—A writ of error is the appropriate proceeding for the review of the judgment of a court of law. An appeal is the appropriate proceeding for the review of the decree of a court of equity or admiralty.

A final order upon an application for a mandamus;<sup>1</sup> a final order or judgment in a proceeding for a seizure and forfeiture of land,<sup>2</sup> or personal property;<sup>3</sup> a judgment in an action upon a promissory note;<sup>4</sup> a judgment in an action for the allotment of dower, although the ancient common-law procedure in such an action has been abrogated by the laws of the State;<sup>5</sup> a judgment of the Court of Appeals of the District of Columbia, affirming a final order of the Supreme Court of that District which admitted to probate and record a certain writing as a last will and testament, after the verdict of a jury,<sup>6</sup> or after a trial without a jury;<sup>7</sup> a judgment upon an intervention by third opposition under sections 395 to 400 of the Louisiana Code of Practice, by a person claiming that property seized on execution is exempt from seizure and sale;<sup>8</sup> a judgment in a criminal case;<sup>9</sup> an order punishing a person for contempt of an order in a case at law or in equity;<sup>10</sup> and a judgment after a trial by jury of the issues raised upon a petition of intervention founded upon a legal cause of action,<sup>11</sup> can be

§ 496. <sup>1</sup> *Ward v. Gregory*, 7 Pet. 633; *Muhlenberg County v. Dyer* (C. C. A.), 65 Fed. R. 634.

<sup>2</sup> *Armstrong's Foundry v. U. S.*, 6 Wall. 766.

<sup>3</sup> *U. S. v. Emholt*, 105 U. S. 414.

<sup>4</sup> *Jones v. Lavallette*, 5 Wall. 579.

<sup>5</sup> *Parish v. Ellis*, 16 Pet. 451.

<sup>6</sup> *Ormsby v. Webb*, 134 U. S. 47.

<sup>7</sup> *Campbell v. Porter*, 162 U. S. 478.

<sup>8</sup> *New Orleans v. Louisiana Construction Co.*, 129 U. S. 45.

<sup>9</sup> *Bucklin v. U. S.*, 159 U. S. 680.

<sup>10</sup> *Gould v. Sessions* (C. C. A.), 67 Fed. R. 163. But see *Nassau El. R. Co. v. Sprague El. R. & M. Co.* (C. C. A.), 95 Fed. R. 415; *supra*, § 344. Upon an appeal from the final decree there may be a review of so much of the order as imposes a fine to indemnify a party injured by the contempt. *Worden v. Searls*, 121 U. S. 14, 26.

<sup>11</sup> *Rouse v. Hornsby* (C. C. A.), 67 Fed. R. 219, 222; *Texas & Pac. Ry.*

reviewed only by writ of error and not by appeal. No appeal can be taken from the final order or decree of a State court, although the proceeding was equitable in its nature.<sup>12</sup> Final orders, judgments, and decrees of State courts can only be reviewed by writ of error.<sup>13</sup>

A final order or decree in a suit or proceeding, which in its essential nature is the foreclosure of a mortgage;<sup>14</sup> a proceeding to enforce a mechanic's lien by a sale of the property subject thereto, and a personal judgment for the deficiency, under a statute providing that the practice shall be in like manner and with like effect as in actions for the foreclosure of mortgages;<sup>15</sup> a judgment of the Court of Appeals of the District of Columbia affirming a final settlement by the Orphans Court of an account of an executrix;<sup>16</sup> and an order of a District or Circuit Court of the United States upon an application for a writ of *habeas corpus*,<sup>17</sup> can be reviewed only by an appeal and not by a writ of error.

The decisions of the District and Circuit Courts in suits upon claims against the United States are reviewed by appeal or writ of error according to the nature of each case.<sup>18</sup> When the record is brought before it by a writ of error, the court looks into it to see if any error of law was committed by the inferior court. There can be no reversal upon a writ of error for any error in fact.<sup>19</sup> Upon an appeal the appellate court regularly reviews the case upon the evidence taken in the inferior court, and certified to it.<sup>20</sup>

To these rules of the English practice the Federal statutes have made certain exceptions. Upon a writ of error there can be no reversal for error in ruling any plea in abatement, such

Co. v. Bloom's Adm'r, 164 U. S. 636, 643; Thompson v. Northern Pac. Ry. Co., 98 Fed. R. 384.

<sup>12</sup> U. S. R. S., § 709; Verden v. Coleman, 22 How. 192; *infra*, § 500.

<sup>13</sup> U. S. R. S., § 709; Verden v. Coleman, 22 How. 192; *infra*, § 500.

<sup>14</sup> Marin v. Lalley, 17 Wall. 14; Brewster v. Wakefield, 22 How. 118.

<sup>15</sup> Idaho & O. L. L. Co. v. Bradbury, 182 U. S. 509.

<sup>16</sup> Kenaday v. Sinnott, 170 U. S. 606, 614.

<sup>17</sup> In re Morrissey, 187 U. S. 157, 158; In re Neagle, 135 U. S. 1, 42; Rice v. Ames, 180 U. S. 371.

<sup>18</sup> Chase v. U. S., 155 U. S. 489; *supra*, § 36.

<sup>19</sup> Wiscart v. Dauchy, 8 Dall. 321, 327; U. S. v. Goodwin, 7 Cranch, 108, 110; Cohens v. Virginia, 6 Wheat. 264; Generes v. Campbell, 11 Wall. 193.

<sup>20</sup> In re Neagle, 135 U. S. 1, 42.

as the plea of the pendency of another suit, other than a plea to the jurisdiction of the court.<sup>21</sup> A decision upon a motion to dismiss because by the death of a party the action has abated, affects the jurisdiction and can be reviewed upon a writ of error.<sup>22</sup> It seems that a writ of error cannot issue from the Supreme Court of the United States to a judgment of a Territorial Court in a case not tried by a jury.<sup>23</sup> The review in the Supreme Court of the United States of a judgment of a Territorial Court in a case not tried by a jury can only be by an appeal.<sup>24</sup> In such a case, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, with the rulings of the court on the admission or rejection of evidence when excepted to, should be made and certified by the court below. The Supreme Court of the United States can only consider the exceptions to the rulings on evidence and also whether the decree can be sustained upon the findings, without reference to the weight of evidence or its sufficiency to support the findings.<sup>25</sup> Upon an appeal from the Court of Claims, the evidence is not included in the findings; and the Supreme Court does not review the decision upon questions of fact.<sup>26</sup>

<sup>21</sup> U. S. R. S., § 1011, as amended 18 St. at L., ch. 80, p. 818; *Piquignot v. Penn. R. Co.*, 16 How. 104; *Stephens v. Monongahela Bank*, 111 U. S. 197.

<sup>22</sup> *Henderson v. Henshall*, 54 Fed. R. 320, 380; *Martin's Adm'r v. B. & O. R. Co.*, 151 U. S. 673, 703. "The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." Lord Ellenborough in *Clark v. Rippon*, 1 B. & Ald. 586; quoted in *Moses v. Wooster*, 115 U. S. 285, and *Martin's Adm'r v. B. & O. R. Co.*, 151 U. S. 673, 703.

<sup>23</sup> 18 St. at L. 27; *Stringfellow v. Cain*, 99 U. S. 610; *Cannon v. Pratt*, 99 U. S. 619; *Gray v. Howe*, 108 U. S.

12; *Thompson v. Ferry*, 180 U. S. 484; *Armijo v. Armijo*, 181 U. S. 557.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*; *Stur v. Beck*, 183 U. S. 541; *San Pedro & C. D. A. Co. v. U. S.*, 146 U. S. 120; *Young v. Amy*, 171 U. S. 179; *Harrison v. Perea*, 168 U. S. 311; *Mammoth Min. Co. v. Salt Lake F. & M. Co.*, 151 U. S. 447; *Black v. Jackson*, 177 U. S. 349; *Caffrey v. Oklahoma Territory*, 177 U. S. 346; *Rogers v. U. S.*, 141 U. S. 548.

<sup>26</sup> S. C. Rules on Appeals from Ct. Cl.; *supra*, § 457; *Talbert v. U. S.*, 155 U. S. 45. This rule does not apply to suits in equity brought in the Court of Claims under special statutes. *U. S. v. Old Settlers*, 148 U. S. 427; *Harvey v. U. S.*, 105 U. S. 671, 691; *La Abra S. Min. Co. v. U. S.*, 175 U. S. 423.

§ 497. Writs of error and appeals to the Supreme Court from the Federal courts.—The Evarts Act as amended provides: “That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.<sup>1</sup> From the final sentences and decrees in prize causes.<sup>2</sup> In cases of conviction of a capital crime.<sup>3</sup> In any case that involves the construction or application of the Constitution of the United States.<sup>4</sup> In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty<sup>5</sup> made under its authority, is drawn in question. In any case in which the Constitution or a law<sup>6</sup> of a State is claimed to be in contravention of the Constitution of the United

§ 497. <sup>1</sup> See *infra*, § 498.

<sup>2</sup> Irrespective of the amount involved. *The Paquete Habana*, 175 U. S. 677.

<sup>3</sup> The former words, “or otherwise infamous crime,” were stricken out by the act of January 20, 1897, 29 St. at L. 492. It seems that the United States cannot review by writ of error a judgment of acquittal except possibly when a constitutional, jurisdictional or treaty question is involved. *U. S. v. Sanges*, 144 U. S. 810.

<sup>4</sup> The question whether a State tax on patent rights is constitutional is one that involves the construction or application of the Constitution of the United States and not one arising under the patent laws. *Holt v. Indiana Mfg. Co. (C. C. A.)*, 80 Fed. R. 1. So is the question whether the Constitution allows the rules and regulations of a Department to have the force of law. *Boske v. Comingore*, 177 U. S. 459. A criminal case, when it involves the construction or application of the Constitution of the United States, may be taken directly from a Circuit Court to the Supreme

Court of the United States, although there has been no conviction of a capital crime. *Motes v. U. S.*, 178 U. S. 458. So may an order denying the writ of *habeas corpus*. *Horner v. U. S.*, No. 2, 148 U. S. 570; *Rice v. Ames*, 180 U. S. 371; *supra*, § 368. If an appeal has previously been taken to a Circuit Court of Appeals in a case of which that court has jurisdiction, a subsequent appeal to the Supreme Court from the Circuit Court will be dismissed. *Carter v. Roberts*, 177 U. S. 496; *Am. Sugar Refining Co. v. New Orleans*, 181 U. S. 377.

<sup>5</sup> *Florida v. Furman*, 180 U. S. 402; *Rice v. Ames*, 180 U. S. 371; *Ornelas v. Ruiz*, 161 U. S. 502, 507; *Borgmeyer v. Idler*, 159 U. S. 408; *Muse v. Arlington Hotel Co.*, 168 U. S. 430; *Robinson v. Caldwell*, 165 U. S. 359; *Budzisz v. Illinois Steel Co.*, 170 U. S. 41; *The Pilot (C. C. A.)*, 53 Fed. R. 11; *In re Newman*, 70 Fed. R. 615.

<sup>6</sup> A city ordinance is considered as a law of the State within the meaning of the statute. *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685.

States.”<sup>7</sup> No appeal or writ of error lies until final judgment or decree.<sup>8</sup> In cases taken directly to the Supreme Court, where a constitutional question is raised, the Supreme Court reviews all the questions in the case, not merely the constitutional question.<sup>9</sup> The same rule applies when the validity or construction of a treaty is drawn in question.<sup>10</sup> The Supreme Court has jurisdiction whether the right claimed under the Constitution was upheld or denied in the court below.<sup>11</sup> The Supreme Court will not take jurisdiction upon this ground when there is no substantial controversy concerning the construction or application of the Constitution, or the validity or construction of a treaty.<sup>12</sup>

The Evarts Act further provides that “the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases;” and “in all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of

<sup>7</sup> 26 St. at L. 827; *Illinois Cent. Ry. Co. v. Adams*, 180 U. S. 28. It is too late to raise the question for the first time in the assignments of error. *Cincinnati, H. & L. R. Co. v. Thibaud*, 177 U. S. 615. See *Arkansas v. Schlierholz*, 179 U. S. 598; *infra*, § 500.

<sup>8</sup> *McLish v. Roff*, 141 U. S. 661; *infra*, § 503.

<sup>9</sup> *Ekiu v. U. S.*, 142 U. S. 651; *Horne v. U. S.*, No. 2, 143 U. S. 570.

<sup>10</sup> *Rice v. Ames*, 180 U. S. 371; *Florida v. Furman*, 180 U. S. 402.

<sup>11</sup> *Holder v. Aultman M. & Co.*, 169 U. S. 81.

<sup>12</sup> *In re Lennon*, 150 U. S. 398; *Carey v. Houston & T. Ry. Co.*, 150 U. S. 170; *C. A. Treat Mfg. Co. v. Standard S. & L. Co.*, 157 U. S. 674; *Merritt v. Bowdoin College*, 169 U. S.

551; *Muse v. Arlington Hotel Co.*, 168 U. S. 430; *Central Tr. Co. v. Citizens' St. Ry. Co.*, 82 Fed. R. 1; *City of Indianapolis v. Central Tr. Co.*, 83 Fed. R. 529; *s. c.*, 27 C. C. A. 580; *Cornell v. Green*, 163 U. S. 75; *Consolidated Water Co. v. Babcock*, 173 U. S. 702; *Lampasas v. Bell*, 180 U. S. 276. It has been held that an issue as to whether due force and effect has been given to a judgment of another State does not involve the construction or application of the Constitution, but depends upon the interpretation of an act of Congress; and that consequently the Circuit Court of Appeals has jurisdiction to review the decision. *Merritt v. Steel Barge Co.* (C. C. A.), 75 Fed. R. 813.

error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.”<sup>13</sup>

It has been held that the Supreme Court can review by writ of error or appeal the final decision of a Circuit Court of Appeals where the matter in controversy exceeds one thousand dollars besides costs, in a case where the Federal jurisdiction depends solely upon the fact that the party is a corporation chartered by Congress;<sup>14</sup> where a suit is brought against a receiver of a national bank appointed by the Comptroller;<sup>15</sup> where a suit is brought against a marshal of the United States and a private person on account of an alleged wrongful execution of the process of a Federal court;<sup>16</sup> where suit is brought by the United States to cancel a patent for an invention;<sup>17</sup> or to dissolve an association formed to monopolize interstate commerce;<sup>18</sup> in a suit brought by the Interstate Commerce Commission to enforce one of its orders;<sup>19</sup> in a suit to recover penalties exceeding one thousand dollars for breach of copyright;<sup>20</sup> and in a suit in which the plaintiff claims relief under the land laws of the United States and shows in his declaration or complaint that there is a controversy between him and the defendant as to their construction.<sup>21</sup> In every subject within the

<sup>13</sup> 26 St. at L. 828, § 6.

<sup>14</sup> No. Pac. R. Co. v. Amato, 144 U. S. 465; Union Pac. R. Co. v. Harris, 158 U. S. 826; Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 853.

<sup>15</sup> Auten v. U. S. Nat. Bank, 174 U. S. 125.

<sup>16</sup> Sonnentheil v. Christian Moerlein Br. Co., 172 U. S. 401.

<sup>17</sup> U. S. v. Am. Bell Tel. Co., 159 U. S. 548. But a writ of *scire facias* upon a forfeited recognizance or bail bond to secure the appearance of the defendant to a criminal charge is a case “arising under the criminal laws” in which the jurisdiction of the Circuit Court of Appeals is final. Hunt v. U. S., 166 U. S. 424.

<sup>18</sup> U. S. v. Trans-Missouri Freight Ass’n, 166 U. S. 290. There it was held that a stipulation that the daily interstate shipments from the competitive points in question exceeded

\$1,000, and an allegation in the answer that free competition would cause great loss and possible financial ruin to the railroad company, were sufficient proof that the matter in controversy exceeded \$1,000.

<sup>19</sup> Interstate Commerce Com’n v. Detroit, G. H. & M. Ry. Co., 167 U. S. 633.

<sup>20</sup> Brady v. Daly, 175 U. S. 148. But not in a suit to recover damages for an infringement of a common-law copyright. Press Publishing Co. v. Monroe, 164 U. S. 105.

<sup>21</sup> Florida C. & P. R. Co. v. Bell, 176 U. S. 321.

The decisions of the Circuit Courts of Appeals are final in suits to review the decisions of the board of general appraisers, since they arise under the revenue laws, Anglo-Californian Bank v. U. S., 175 U. S. 37; in proceedings to limit the liability of ship-



appellate jurisdiction of a Circuit Court of Appeals, in which its judgment or decree is final, said Circuit Court of Appeals at any time may certify to the Supreme Court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.”<sup>22</sup> In any case in which the decision of a Circuit Court of Appeals is final, the Supreme

owners, since they are admiralty cases, *Oregon R. & Nav. Co. v. Balfour*, 179 U. S. 55; in suits for damages on account of the infringement of a common-law copyright, *Press Pub. Co. v. Monroe*, 164 U. S. 105; in proceedings upon petitions of intervention, *Rouse v. Hornsby*, 161 U. S. 588; *Gregory v. Van Ee*, 160 U. S. 643; in suits brought by and against receivers of Federal courts, when the sole ground of jurisdiction is that in the suits wherein they were appointed there was a diversity of citizenship, *Pope v. Louisville, N. A. & C. Ry. Co.*, 173 U. S. 573; *Rouse v. Hornsby*, 161 U. S. 588; *Carey v. Houston & T. C. Ry. Co.*, 161 U. S. 115; and in suits in which the original ground of jurisdiction and the only one that appeared by the plaintiff's pleading was a difference of citizenship, although subsequently another ground for jurisdiction appeared. *Colorado C. C. Min. Co. v. Turck*, 150 U. S. 138; *Borgmeyer v. Idler*, 159 U. S. 408; *Third St. & Suburban Ry. Co. v. Lewis*, 173 U. S. 457; *Am. Sugar Refining Co. v. New Orleans*, 181 U. S. 277. See also *Benjamin v. New Orleans*, 169 U. S. 161. No appeal lies to the Supreme Court from a decree of a Circuit Court of Appeals upon an application for the

writ of *habeas corpus*, since the matter in controversy cannot be measured in money. *Lau Ow Bew v. U. S.*, 144 U. S. 47. Nor from an order affirming or reversing an interlocutory order for an injunction. *Kirwan v. Murphy*, 170 U. S. 205. Nor from a decree of such a court that is not final in its nature. *U. S. v. Krall*, 174 U. S. 385; *MacLeod v. Graven (C. C. A.)*, 79 Fed. R. 84; *infra*, § 503. “It is settled that the words ‘unless otherwise provided by law,’ in this section, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes.” Gray, J., in *The Paquete Habana*, 175 U. S. 677, 683.

The Evarts Act has repealed U. S. R. S., §§ 651 and 697, U. S. v. Rider, 163 U. S. 132; U. S. v. Hewecker, 164 U. S. 46; U. S. R. S., § 763; *Webb v. York*, 74 Fed. R. 753. See *Ex parte Lennon*, 150 U. S. 393; 18 St. at L. 315, § 3; *The Havilah (C. C. A.)*, 48 Fed. R. 684; and so much of § 16 of the Interstate Commerce Law as allowed an appeal direct to the Supreme Court from certain orders of the Circuit Court under that act. *Interstate Com. Com’n v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264.

<sup>22</sup> 26 St. at L. 828, § 67; *infra*, § 499.

Court may require, by *certiorari* or otherwise, any such case to be certified to it "for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."<sup>23</sup>

The Supreme Court of the United States is "invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy" from which it has appellate jurisdiction in other cases. "The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia."<sup>24</sup> "From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or 2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claims is essential to a uniform construction of this act throughout the United States."<sup>25</sup>

The Supreme Court has jurisdiction to review by appeal, on behalf of the United States, all final judgments of the Court of Claims adverse to the United States; by appeal, on behalf of the plaintiff, all judgments of the Court of Claims in any case where the amount in controversy exceeds three thousand dollars, or his claim has been forfeited to the United States for fraud;<sup>26</sup> and upon the appeal of either party all decisions

<sup>23</sup> Ibid.

<sup>24</sup> 80 St. at L. 544, 553, § 24.

<sup>25</sup> *Bardes v. Hammond First Nat. Bank*, 175 U. S. 526; 80 St. at L. 544, 553, § 25.

<sup>26</sup> U. S. R. S., § 707. Where the United States has taken an appeal from a decision of the Court of Claims against them, the claimant may take a cross-appeal from so much of the judgment as disallowed

part of his claim, although the sum of the items disallowed does not exceed \$3,000. *U. S. v. Mosby*, 133 U. S. 273, 289. No appeal lies to the Supreme Court from the findings and decisions of the Court of Claims upon a claim sent thereto by the head of a department for investigation, in pursuance of an act of Congress, which does not make the decisions of the court binding upon the

of the Court of Private Land Claims which confirm or reject a claim in whole or in part.<sup>27</sup> The Supreme Court of the United States may review by writ of error all final judgments, and by appeal all final decrees, of the Court of Appeals of the District of Columbia, in any case where the value of the matter in dispute exceeds the sum or value of five thousand dollars; and irrespective of the value of the matter in dispute in any case wherein is involved "the validity of any patent or copyright, or case in which is drawn in question the validity of a treaty or a statute, or of an authority exercised under the United States."<sup>28</sup>

department: In re Sanborn, 148 U. S. 222. Cf. Talbert v. U. S., 155 U. S. 45. But see U. S. v. Jones, 119 U. S. 477. For cases where the Supreme Court refused to look into the facts, see McClure v. U. S., 116 U. S. 145; Union Pac. Ry. Co. v. U. S., 116 U. S. 154.

<sup>27</sup> 26 St. at L. 854; U. S. v. Coe, 155 U. S. 76; *supra*, § 472.

<sup>28</sup> 27 St. at L. 436; 28 St. at L. 443; Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210; District of Columbia v. Gannon, 130 U. S. 227; In re Heath, 144 U. S. 92; Clayton v. Utah, 132 U. S. 632, 637: "It will be observed that this second section of the statute, while it is based upon the general principle which is found in the act of Congress allowing writs of error from this court to the highest courts of a State, namely, to protect parties against the exercise of an unlawful power on the part of the State authorities, does not use the language which is found in that act, that to give this court jurisdiction the decision of the State court must be *against* the right or power set up by the party under the laws of the United States." See Idaho & O. Land Imp. Co. v. Bradbury, 132 U. S. 509; *supra*, § 477; *infra*, § 500.

Where the validity of a patent or copyright is not involved, and the

validity of a treaty, statute or authority exercised under the United States is not in question, the Supreme Court has no jurisdiction of appeals from orders, decrees or judgments of the Court of Appeals of the District of Columbia upon applications for writs of *habeas corpus*, Cross v. Burke, 146 U. S. 82; not even where the right to the custody of a child is involved, Perrine v. Slack, 164 U. S. 452; nor in criminal cases where the punishment is capital, Cross v. U. S., 145 U. S. 571; Chapman v. U. S., 164 U. S. 436; In re Heath, 144 U. S. 92; nor in suits against the Commissioner of Patents to compel the issue of a patent, since such a suit does not involve the validity of a patent, and the value of the right sought to be enforced is incapable of a pecuniary valuation. Durham v. Seymour, 161 U. S. 235. See *infra*, § 504.

The validity of an authority exercised under the United States is not drawn in question by defending a suit brought by the Government for the abatement of a fence upon public land. Cameron v. U. S., 146 U. S. 533.

The phrase "validity of a statute," when used in the Acts of Congress which confer jurisdiction to review the decisions of the Supreme Courts

The Supreme Court of the United States has the same jurisdiction over the Supreme Courts of the continental Territories<sup>29</sup> that it has over the Circuit Courts of the United States. The Supreme Court of the United States has also jurisdiction to review the final judgments and decrees of the Supreme Courts of the continental Territories which are not subject to review by the Circuit Courts of Appeals; that is, in cases not founded on citizenship nor arising under the patent, revenue or criminal laws, nor in admiralty; and in which is involved the validity of a copyright, or the validity of a treaty of a statute, or of an authority exercised under the United States is drawn in question; also in any case in which a Circuit Court of Appeals has no jurisdiction as aforesaid, wherein the value of the matter in dispute, exclusive of costs, exceeds five thousand dollars;<sup>30</sup> and perhaps also in cases of applications for the writ of *habeas corpus*.<sup>31</sup>

of the District and the Territories, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction. *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 226, per Fuller, C. J.; *District of Columbia v. Gannon*, 180 U. S. 227. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted; nor is the validity of an authority, every time an act done by such authority is disputed. *Cook County v. Calumet & C. C. & D. Co.*, 138 U. S. 635, 653, per Fuller, C. J. It seems that the authority exercised in the case appealed, by the court from which the appeal is taken, is not the authority intended by the act. *Snow v. U. S.*, 118 U. S. 346, 347. The validity of an authority is not drawn in question unless such validity is primarily denied, and the denial made the subject of direct inquiry. *Cook County v. Calumet & C. C. & D. Co.*, 138 U. S. 635, 653. The validity of the authority of an officer to audit an account is not drawn in question by an application for a *mandamus*

to compel him to allow a credit which he rejected. *U. S. v. Lynch*, 137 U. S. 280. The validity of an authority is drawn in question when the right to hold an office is disputed. *Clough v. Curtis*, 134 U. S. 361, 370.

The Supreme Court of the United States, where the value of the matter in dispute exceeds the sum or value of \$5,000, may review the judgments of the Court of Appeals of the District of Columbia which affirm or modify the settlement of accounts by the Orphans Court, *Kennedy v. Sinnott*, 179 U. S. 606; and which affirm judgments admitting wills to probate. *Ormsby v. Webb*, 134 U. S. 47.

It seems that the Supreme Court may review by a writ of error to the judgment of the trial court in the District of Columbia, and perhaps in a Territory, a conviction of a capital crime. 25 St. at L. 655, § 6; *Cross v. U. S.*, 145 U. S. 571, 576, 577, 578.

<sup>29</sup> 26 St. at L. 905, § 15.

<sup>30</sup> 23 St. at L. 443; *Shute v. Keyser*, 149 U. S. 649; *Aztec Mining Co. v. Ripley*, 151 U. S. 79; *Simms v. Simms*, 175 U. S. 162, 166.

<sup>31</sup> *Simms v. Simms*, 175 U. S. 162,

The Supreme Court has jurisdiction of appeals from the United States courts in the Indian Territory "in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation for the citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said courts in other cases."<sup>32</sup>

"Writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question, and the right claimed is denied."<sup>33</sup>

166; *Gonzales v. Cunningham*, 164 U. S. 612.

<sup>32</sup>Such appeals must be taken "within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible." 30 St. at L. 591. See *Stephens v. Cherokee Nation*, 174 U. S. 445, 481; *Brown v. U. S.*, 171 U. S. 635. The Supreme Court of the United States has no other jurisdiction to review by appeal or writ of error the judgments or decrees of the United States courts in the Indian Territory, not even in capital cases. *Brown v. U. S.*, 171 U. S. 631. Nor where the constitutionality of an act of Congress is in question. *Ansley v. Ainsworth*,

180 U. S. 253. Such judgments and decrees are reviewed by the Court of Appeals for the Indian Territory. Writs of error and appeals from the final decision in that appellate court may be allowed and taken to the Circuit Court of Appeals for the Eighth Circuit, in the same manner as appeals are taken thereto from the Circuit Courts of the United States. 28 St. at L. 698. It may be that the Supreme Court can review the decisions of that Circuit Court of Appeals upon appeals and writs of error from the Indian Territory in the same cases as when such decrees are rendered upon appeals or writs of error from the Circuit Courts of the United States. See *Ansley v. Ainsworth*, 180 U. S. 253, 260.

<sup>33</sup>31 St. at L. 185.

"The laws of the United States as relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall

“The Supreme Court has also jurisdiction to review by writ of error all final judgments and decrees in any suit in the highest court of a State in which a decision in the suit could be had, where has been drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision has been against their validity; or where has been drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision has been in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority.”<sup>24</sup> The Supreme Court of the United States has power to exercise jurisdiction in its nature appellate by means of the writs of prohibition, *certiorari*, *mandamus*, and *habeas corpus*, as previously described.<sup>25</sup>

§ 498. Review by Supreme Court of questions of jurisdiction.—The statute provides: “That appeals or writs of error may be taken from District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.”<sup>1</sup> The words “at issue” are not confined to a formal issue raised by the findings, but include every case in which a question of jurisdiction is distinctly raised in any form.<sup>2</sup> The jurisdiction intended by the statute is the jurisdiction of the court below in the suit wherein the decree appealed from is entered, not its jurisdiction to render a former decree, which the suit wherein the appeal is taken seeks to set aside.<sup>3</sup> The questions whether a cause of action is barred by lapse of time, either because of a

govern in such matters and proceedings as between courts of the United States and the courts of the Territory of Hawaii.” 81 St. at L. 158.

<sup>24</sup> U. S. R. S., § 709. See *infra*, § 500.

<sup>25</sup> *Supra*, §§ 362–368; *infra*, § 499.

§ 498. <sup>1</sup> 26 St. at L. 827, § 5.

<sup>2</sup> *Shepard v. Adams*, 168 U. S. 618; *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92.

<sup>3</sup> *Carey v. Houston & T. C. Ry. Co.*, 150 U. S. 172.



statutory limitation, or by a limitation contained in an order requiring claims to be presented within a specified period,<sup>4</sup> or by laches<sup>5</sup> in equity or admiralty irrespective of any statutory limitation; whether the bill states a case of equitable cognizance;<sup>6</sup> whether the bill complies with Equity Rule 94;<sup>7</sup> and perhaps whether, although nominally against an individual, it is in reality a suit against a State,<sup>8</sup>—are not of jurisdiction. The questions whether there existed the necessary difference of citizenship,<sup>9</sup> or a Federal question;<sup>10</sup> whether the value of the matter in dispute was sufficient to give a Circuit Court jurisdiction;<sup>11</sup> whether a District Court acquired jurisdiction over the defendant by valid service;<sup>12</sup> whether a petition for a removal was filed in proper time;<sup>13</sup> whether a District Court in a proceeding in admiralty for a limitation of the liability of a ship-owner, after final disposition of all points affecting the right of the petitioners to a limitation of their liability, has power to enter a decree *in personam* against them for damages caused to some of the intervenors;<sup>14</sup> and whether the possession of the property by a State court, or the pendency of a suit in a State court for the same relief, ousts the Federal court of jurisdiction,<sup>15</sup>—have been held to be jurisdictional, and reviewable by the Supreme Court.

The right to review by the Supreme Court in such cases depends upon the existence of a question of jurisdiction, and no other question in the case will then be considered by that tri-

<sup>4</sup> *Texas & Pac. Ry. Co. v. Saunders*, 151 U. S. 105.

<sup>5</sup> *Laidlaw v. Oregon & Nav. Co.* (C. C. A.), 81 Fed. R. 876.

<sup>6</sup> *World's Columbian Exposition v. U. S.* (C. C. A.), 56 Fed. R. 654; *Smith v. McKay*, 161 U. S. 855; *U. S. v. Swan* (C. C. A.), 65 Fed. R. 647. Nor the question whether there is *res adjudicata*. *Van Wagenen v. Sewall*, 160 U. S. 369; *Blythe v. Hinckley*, 173 U. S. 501.

<sup>7</sup> *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 84; *supra*, § 76.

<sup>8</sup> *Ibid.*, 180 U. S. 28, 38.

<sup>9</sup> *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571.

<sup>10</sup> *Ibid.*

<sup>11</sup> Even when that depends upon a question of fact. *Wetmore v. Rymer*, 169 U. S. 115.

<sup>12</sup> *Sheppard v. Adams*, 168 U. S. 618.

<sup>13</sup> *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92.

<sup>14</sup> *The Annie Faxon* (C. C. A.), 87 Fed. R. 961.

<sup>15</sup> *Shields v. Coleman*, 157 U. S. 168; *Huntington v. Laidley*, 176 U. S. 668. But the dismissal of a bill, upon the ground that the decree or judgment of a State court cannot be reviewed, because of its erroneous decision of certain constitutional questions does not raise a question of jurisdiction. *Blythe v. Hinckley*, 173 U. S. 501.

bunal.<sup>16</sup> When the unsuccessful party wishes to have the judgment or decree reviewed upon jurisdictional grounds and other grounds as well, he cannot appeal to both the Supreme Court and the Circuit Court of Appeals.<sup>17</sup> Where two such appeals are taken, the second appeal will be dismissed.<sup>18</sup> It has been held that the Circuit Courts of Appeals have no jurisdiction over appeals and writs of error where the only assignments of error are jurisdictional questions.<sup>19</sup> Where, however, the assignments include other errors, it has been held that the Circuit Court of Appeals can determine the whole case, including the question of jurisdiction,<sup>20</sup> and that it may certify the jurisdictional question to the Supreme Court, which will then consider it.<sup>21</sup> Chief Justice Fuller said: "Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court. (2) If the question of jurisdiction is in issue and the jurisdiction sustained, and then judgment or decree rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the

<sup>16</sup> *Passavant v. U. S.*, 148 U. S. 214; *McLish v. Roff*, 141 U. S. 661; *Schunk v. M. & S. Co.*, 147 U. S. 500.

<sup>17</sup> *Columbus Const. Co. v. Crane Co.*, 174 U. S. 600; *U. S. v. Jahn*, 155 U. S. 109, 118.

<sup>18</sup> *Columbus Const. Co. v. Crane Co.*, 174 U. S. 600. But see *Robinson v. Caldwell*, 168 U. S. 359, 362; *Pullman P. C. Co. v. Central Tr. Co.*, 171 U. S. 138; *s. c.*, 89 U. S. App. 307. It has been held that the issue of a writ of error from the Supreme Court to review a judgment of the Circuit Court for want of jurisdiction does not prevent the Circuit Court of Appeals from issu-

ing a writ of error to review an order subsequent to the judgment denying a new trial claimed under a State statute. *Shreve v. Cheesman* (C. C. A.), 69 Fed. R. 785. *Cf.* *No. Pac. R. Co. v. Glaspell* (C. C. A.), 49 Fed. R. 482.

<sup>19</sup> *The Annie Faxon* (C. C. A.), 87 Fed. R. 961; *Davis & R. Mfg. Co. v. Barber* (C. C. A.), 60 Fed. R. 465.

<sup>20</sup> *The Alliance* (C. C. A.), 70 Fed. R. 273; *U. S. v. Sutton* (C. C. A.), 47 Fed. R. 129; *Cabot v. McMaster* (C. C. A.), 65 Fed. R. 533.

<sup>21</sup> *Rust v. United Water Works Co.* (C. C. A.), 70 Fed. R. 129; *American S. R. Co. v. Johnston* (C. C. A.), 60 Fed. R. 503; *U. S. v. Jahn*, 155 U. S. 109.

whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."<sup>22</sup>

It is the safer practice to procure a formal certificate from the court of first instance stating that a question of jurisdiction is in issue.<sup>23</sup> But it seems that such a formal certificate is not indispensable, where the record shows a plain declaration by the court that the single matter sent up for decision is a question of jurisdiction.<sup>24</sup> Thus, where the petition for the allowance of the writ of error or appeal asks for a review of the judgment or decree upon a single question of jurisdiction, which is clearly specified therein or in the order granting the application, the question of jurisdiction is certified with sufficient formality.<sup>25</sup> A certificate stating the whole case and propounding a question which requires an analysis of the facts,<sup>26</sup> and the allowance of a prayer for an appeal "upon the ground that this court was without jurisdiction to make the decree," without

<sup>22</sup> *U. S. v. Jahn*, 155 U. S. 109, 114, 115.

<sup>23</sup> *Maynard v. Hecht*, 151 U. S. 324; *Carey v. Houston & T. C. Ry. Co.*, 150 U. S. 170, 179; *Moran v. Hagerman*, 151 U. S. 329; *Colvin v. Jacksonville*, 157 U. S. 368; *Chappell v. U. S.*, 160 U. S. 499; *Lutcher v. U. S.*, 157 U. S. 427; *Davis v. Geissler*, 162 U. S. 290; *The Bayonne*, 159 U. S. 687; *Van Wagenen v. Sewell*, 160 U. S. 369.

<sup>24</sup> *Shields v. Coleman*, 157 U. S. 168, 177; *Interior C & L Co. v. Gibney*, 160 U. S. 217 *Smith v. McKay*, 161

U. S. 855; *In re Lehigh Min. & Mfg. Co.*, 156 U. S. 322; *Harkrader v. Wadley*, 172 U. S. 148.

<sup>25</sup> *Ibid.* The certificate may be made in the bill of exceptions. *In re Lehigh Min. & Mfg. Co.*, 156 U. S. 322.

<sup>26</sup> *Graver v. Faurot*, 162 U. S. 435; *Cross v. Evans*, 167 U. S. 60; *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S. 55, 92; *Sioux City, O'N. & W. Ry. Co. v. Manhattan Tr. Co.*, 172 U. S. 642; *U. S. v. Union Pac. Ry. Co.*, 168 U. S. 505, 513. But see *In re Lehigh Min. & Mfg. Co.*, 156 U. S. 322.

specifying the defect,<sup>27</sup> and a certificate of a jurisdictional question when it does not appear there or in the record that it was in issue, or affected the decision,<sup>28</sup> are insufficient. The question of jurisdiction cannot be certified to the Supreme Court by a Circuit or District Court until after the final judgment or decree;<sup>29</sup> but a Circuit Court of Appeals may certify such a question at any time before its decision of the case.<sup>30</sup> A Circuit or District Court cannot grant such a certificate after the term at which the judgment or decree was entered.<sup>31</sup> It cannot at a later term grant the certificate *nunc pro tunc*.<sup>32</sup> The district judge may sign the certificate, even in a case in the Circuit Court which was decided by the circuit judge.<sup>33</sup>

**§ 499. Certification to the Supreme Court by the Circuit Courts of Appeals.**—The Evarts Act provides: “That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal, or by writ of error, final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law. And the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also, in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in

<sup>27</sup> *The Bayonne*, 159 U. S. 687; *Bardes v. Hawarden First Nat. Bank*, Chappell v. U. S., 160 U. S. 499. See 175 U. S. 526.

also *Van Wagenen v. Sewall*, 160 U. S. 369; *Chappell v. U. S.*, 160 U. S. 499. <sup>30</sup> 26 St. at L. 828, § 6; *infra*, § 499.

<sup>28</sup> *Arkansas v. Schlierholz*, 179 U. S. 598. <sup>31</sup> *Colvin v. City of Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687.

<sup>29</sup> *McLish v. Ruff*, 141 U. S. 661; <sup>32</sup> *The Bayonne*, 159 U. S. 687. <sup>33</sup> *Huntington v. Laidley*, 176 U. S. 668, 677.

such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy, in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”<sup>1</sup>

The following rule regulates the practice under this act:

“Where, under section 6 of the said act, a Circuit Court of Appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

“If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

“Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant as part of the application.”<sup>2</sup>

It has been held: that a Circuit Court of Appeals will only certify a question to the Supreme Court for instruction before it decides the same,<sup>3</sup> upon its own motion;<sup>4</sup> that it will not permit a party to move for such a certificate before the argument;<sup>5</sup> that the certificate cannot be made unless a quorum of the court is present;<sup>6</sup> nor in a case where the decision of the Cir-

§ 499. <sup>1</sup>26 St. at L, ch. 517, § 6, p. 828.

<sup>2</sup>S. C. Rule 37; 139 U. S. 706.

<sup>3</sup>Andrews v. Nat. Foundry & P. Works (C. C. A.), 77 Fed. R. 774.

<sup>4</sup>Ibid.; Louisville, N. A. & C. Ry. Co. v. Pope (C. C. A.), 74 Fed. R. 1.

<sup>5</sup>Louisville, N. A. & C. Ry. Co. v. Pope (C. C. A.), 74 Fed. R. 1.

<sup>6</sup>Cincinnati, H. & D. R. Co. v. McKean, 149 U. S. 257.

cuit Court of Appeals is not final.<sup>7</sup> The questions certified must each consist of a single question of law,<sup>8</sup> which can be answered without a reference to the pleadings or evidence.<sup>9</sup> They must not be questions of mixed law or fact.<sup>10</sup> Nor can the whole case be thus sent up for review.<sup>11</sup> A Circuit Court

<sup>7</sup> *Texas & Pac. Ry. Co. v. Gentry* (C. C. A.), 57 Fed. R. 422.

<sup>8</sup> *McHenry v. Alford*, 163 U. S. 651; *Grover v. Faurot*, 162 U. S. 435; *Del Monte Min. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55; *U. S. v. Union Pac. Ry. Co.*, 168 U. S. 505; *Warner v. New Orleans*, 167 U. S. 467; *Cross v. Evans*, 167 U. S. 60. In each of the foregoing cases the certificate was held to be insufficient. So where the certificate stated that as the judgment of the Circuit Court of Appeals "differs from that of a co-ordinate court, the instruction of the Supreme Court is requested." *Columbus Watch Co. v. Robbins*, 148 U. S. 266. The fact that one or more of the judges of the Circuit Court of Appeals was disqualified was held to be a sufficient reason for making the certificate. *Farmers' & M. State Bank v. Armstrong* (C. C. A.), 49 Fed. R. 600.

The rules which were formerly in force as to certificates of a division of opinion between the judges holding a Circuit Court under U. S. R. S., §§ 650, 659, 693, govern in most respects the certificates by the Circuit Courts of Appeals. *Graver v. Faurot*, 162 U. S. 435; *U. S. v. Rider*, 163 U. S. 132, 139; *U. S. v. Union Pac. Ry. Co.*, 168 U. S. 505. Under these statutes the certificates were held to be sufficient in the following cases: *Skillern's Ex'rs v. May's Ex'rs*, 6 Cranch, 267; *U. S. v. Tyler*, 7 Cranch, 285; *Wayman v. Southard*, 10 Wheat. 1; *U. S. v. Chicago*, 7 How. 185; *Shelby v. Bacon*, 10 How. 56; *Havemeyer v. Board of Supervisors*, 3 Wall. 294; *Veazie v. Wadleigh*, 11 Pet. 55; *Pelham v. Rose*, 9 Wall. 103; *Ex parte Milligan*, 4 Wall.

2; *Ward v. Chamberlain*, 2 Black, 430; *Somerville's Ex'rs v. Hamilton*, 4 Wheat. 230; *U. S. v. Hall*, 98 U. S. 843; *U. S. v. Irvine*, 98 U. S. 450; *U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Hirsch*, 100 U. S. 38; *U. S. v. Stefens et al.*, 100 U. S. 32; *Tennessee v. Davis*, 100 U. S. 257; *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Britton*, 107 U. S. 655; *U. S. v. Curtis*, 107 U. S. 671; *Bartholomew v. Trustees*, 105 U. S. 61; *U. S. v. Ambrose*, 108 U. S. 336; *U. S. v. Gale*, 109 U. S. 65; *U. S. v. Waddell*, 112 U. S. 76; *U. S. v. Spiegel*, 116 U. S. 270; *California Paving Co. v. Molitor*, 113 U. S. 669; *Mackin v. U. S.*, 117 U. S. 348; *U. S. v. Kagermer*, 118 U. S. 375; *U. S. v. Rauscher*, 119 U. S. 407; *U. S. v. Northway*, 120 U. S. 327; *Enfield v. Jordan*, 119 U. S. 680; *U. S. v. Argona*, 120 U. S. 479; *U. S. v. Le Bris*, 121 U. S. 278; *U. S. v. Hess*, 124 U. S. 483; *Hosford v. Germania F. I. Co.*, 127 U. S. 399; *Fire Ins. Ass'n v. Wickham*, 128 U. S. 426; *U. S. v. Lacher*, 134 U. S. 624; *U. S. v. Chase*, 135 U. S. 255; *U. S. v. Brewer*, 139 U. S. 278; *Scott v. Armstrong*, 146 U. S. 499, 502; *Grant v. Raymond*, 6 Pet. 218, 220; *U. S. v. Wilson*, 7 Pet. 150; *U. S. v. Thomas*, 151 U. S. 577, 581. A complete list of the questions which the Supreme Court answered and of those which it declined to answer before March 3, 1901, prepared by Mr. James C. Van Siclen of the New York bar, is contained in a note to § 476 of the second edition of this book.

<sup>9</sup> *McHenry v. Alford*, 163 U. S. 651.

<sup>10</sup> *Warner v. New Orleans*, 167 U. S. 467; *Graver v. Faurot*, 162 U. S. 435.

<sup>11</sup> *Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.*, 171 U. S. 55;



should not accompany its certificate by a transcript of the record until ordered by the Supreme Court to transmit the same.<sup>12</sup> The statement of facts in the certificate must contain only the fundamental facts and not the evidential facts from which the fundamental facts are found.<sup>13</sup> A jurisdictional question,<sup>14</sup> and a question involving the construction or application of the Constitution of the United States,<sup>15</sup> may thus be certified in a case of which the Circuit Court of Appeals has jurisdiction.

A *certiorari* will issue from the Supreme Court under this section of the Evarts act where questions of gravity or importance are involved, or in the interest of uniformity of decision.<sup>16</sup> It will usually issue where questions of international importance are involved;<sup>17</sup> where there is a difference of opinion between different Circuit Courts of Appeals;<sup>18</sup> where there is an important conflict between the decisions of a Circuit Court of Appeals and a State Supreme Court in the same circuit;<sup>19</sup> and where there is a question as to the disqualification of a judge of the Circuit Court of Appeals to sit in the case.<sup>20</sup> The writ is issued with great liberality in cases of admiralty, and very rarely in patent cases. The writ may issue in a case which the Circuit Court of Appeals has dismissed for an alleged want of jurisdiction.<sup>21</sup> The Supreme Court may, but rarely will, order the certification of the record on an appeal to the Circuit Court of Appeals from an interlocutory order.<sup>22</sup> The Supreme Court cannot issue a *certiorari* to bring before it a case when it has appellate jurisdiction to review the same by appeal or

Graver v. Faurot, 162 U. S. 435; 587, 588; U. S. v. The Three Friends, Warner v. New Orleans, 167 U. S. 166 U. S. 1.  
467.

<sup>12</sup> Cincinnati H. & D. R. Co. v. McKen, 149 U. S. 259; Farmers' & M. State Bank v. Armstrong (C. C. A.), 49 Fed. R. 600.  
<sup>18</sup> Columbus Watch Co. v. Robbins, 148 U. S. 266.

<sup>13</sup> Sigafus v. Porter (C. C. A.), 85 Fed. R. 689.  
<sup>19</sup> Forsyth v. Hammond, 166 U. S. 506.

<sup>14</sup> U. S. v. Jahn, 155 U. S. 109.  
<sup>20</sup> American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372.  
<sup>15</sup> Am. Sugar Refining Co. v. New Orleans, 181 U. S. 277.  
<sup>21</sup> Kingman & Co. v. Western Mfg. Co., 170 U. S. 675; American S. R. Co. v. New Orleans, 181 U. S. 277.

<sup>16</sup> In re Woods, 143 U. S. 202, 206, per Fuller, C. J. Cf. Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354.  
<sup>22</sup> American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 386.

<sup>17</sup> In re Lau Ow Bew, 141 U. S. 583,

writ of error.<sup>23</sup> The Supreme Court may issue a *certiorari* directing the whole case before the Circuit Court of Appeals to be certified to it for its decision, whether its advice is requested or not.<sup>24</sup> The decision of the Circuit Court of Appeals upon a former appeal in the same case may thus be reviewed.<sup>25</sup> The writ may issue after the mandate of the Circuit Court of Appeals has been sent to the court of first instance.<sup>26</sup> The writ may be issued at any time within a year after the decision which it brings up for review.<sup>27</sup>

The practice is to submit to the Supreme Court a petition for the writ accompanied by a certified copy of the record below, and to file twenty-five printed copies of the petition. A deposit of twenty-five dollars for the clerk's fees should be made when the papers are filed. An appearance for the petitioner should then be entered; and notice of the application should be given to the respondent or to the attorneys who appeared for him in the Circuit Court of Appeals. They are permitted to submit briefs in opposition to the application. The case is placed upon the appellate docket when the petition is filed; but no oral arguments are allowed unless the writ is granted or a rule to show cause why it should not issue is made.

The errors assigned by a party who took a cross-appeal to the Circuit Court of Appeals, but who filed no petition for the *certiorari*, will rarely if ever be considered.<sup>28</sup> The effect of the writ is ordinarily to suspend all proceedings by the Circuit Court of Appeals and by the trial court in obedience to its mandate; but it has been said that it does not authorize the court of first instance, before a decision of the Supreme Court, to set aside orders previously made in obedience to the mandate before the *certiorari* was issued.<sup>29</sup> Where upon a petition for the writ of *certiorari*, a rule to show cause is entered, a return made to the rule and full argument had, the court, if there is no dispute as to the facts, may order the return to stand as the return to the writ and decide the case at once.<sup>30</sup>

<sup>23</sup> *Lau Ow Bew v. U. S.*, 144 U. S. 47; *McLish v. Roff*, 141 U. S. 681.

<sup>24</sup> *Lau Ow Bew v. U. S.*, 144 U. S. 47.

<sup>25</sup> *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280. But see *Smith v. Vulcan Iron Works*, 165 U. S. 518.

<sup>26</sup> *The Conqueror*, 166 U. S. 110.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Hubbard v. Tod*, 171 U. S. 474.

<sup>29</sup> *Louisville, N. A. & C. Ry. Co. v. Louisville Tr. Co.*, 78 Fed. R. 659.

<sup>30</sup> *American S. R. Co. v. New Orleans*, 181 U. S. 277, 283.

**§ 500. Writs of error from the Supreme Court to State courts.**—The Revised Statutes provide that “a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority,—may be re-examined, and reversed or affirmed, in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed. The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ.”<sup>1</sup> The title

**§ 500.** <sup>1</sup> U. S. R. S. § 709. A defense grounded upon an order of a Federal court is a claim of a right or immunity under an authority exercised under the United States. *Texas & Pac. Ry. Co. v. Johnson*, 151 U. S. 81, 99; *Pittsburgh, C., C. & St. L. Ry. Co. v. Long Island L. & Tr. Co.*, 172 U. S. 493. So is a defense based upon a decree of a Federal court. *Dowell v. Applegate*, 152 U. S. 327. But see *Avery v. Popper*, 179 U. S. 805. As to bankruptcy, see *supra*, § 495. A writ of error lies to review a judgment of the highest court of a State, denying to the plaintiff in error a right

claimed under the rules of navigation established by Federal statutes. The appellate jurisdiction of the Supreme Court over questions national and international in their nature, arising in an action for a marine tort committed in navigable waters, cannot be restrained by the fact that the plaintiff has elected to pursue a common-law remedy in a State court. *Belden v. Chase*, 150 U. S. 674, 691. A judgment for the recovery of land against defendants, officers of the army, who claim to hold the same as the property of the United States, may be thus reviewed.

or right claimed under the Federal law must be one claimed by the plaintiff in error, and not the right of a third person only.<sup>2</sup> The validity of a statute is not drawn in question every time that a right claimed under such statute is controverted; nor is the validity of an authority drawn in question every time that an act done by such authority is disputed.<sup>3</sup> "When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error."<sup>4</sup> Where the decision of the State court is in favor of the title, right, privilege, or immunity claimed under the Federal author-

*Stanley v. Schwalby*, 147 U. S. 508. A judgment of a State court against a receiver appointed by a Federal court, who has made no defense, based upon the Constitution or a Federal statute or authority, cannot. *Bausman v. Dixon*, 173 U. S. 118. But see *McNulta v. Lochridge*, 141 U. S. 327. See also *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556.

<sup>2</sup> *Giles v. Little*, 184 U. S. 645, 650; *Owings v. Norwood*, 5 Cranch, 344; *Conde v. York*, 168 U. S. 642; *Lampasas v. Bell*, 180 U. S. 276; *Tyler v. Judges*, 179 U. S. 405.

<sup>3</sup> *Cook County v. Calumet & C. C. & D. Co.*, 138 U. S. 635, 658, 654. In *Ferry v. King County*, 141 U. S. 668, the fact that a State statute and a mortgage made in pursuance thereof refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State thereunder, does not make the determination of such rights a Federal ques-

tion. "A State may prescribe the procedure in the Federal courts as the rules of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such case an examination may be necessary of the acts of Congress, the rules of the Federal courts and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of State rule and practice. The facts by which that State rule and practice are determined may be of a Federal origin." *Miller's Ex'rs v. Swann*, 150 U. S. 132, 137, per Brewer, J.

<sup>4</sup> U. S. R. S., § 1017.

ity, the Supreme Court has no jurisdiction to review it.<sup>5</sup> "Cases on writ of error to revise the judgment of a State court in any criminal case, shall have precedence, on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance."<sup>6</sup> The jurisdiction of the Supreme Court to review judgments and decrees of State courts, although at first bitterly contested,<sup>7</sup> has been held to be constitutional.<sup>8</sup>

<sup>5</sup> *Missouri v. Andriano*, 138 U. S. 496.

<sup>6</sup> U. S. R. S., § 710.

<sup>7</sup> *Tyranny Unmasked*, by John Taylor of Virginia, pp. 305, 306: "Thus, the preservation of good manners is taken from the States, and intrusted to combinations whose own manners want improvement. And thus Congress has invented by the judicial law a process, by the name of a writ of error, equivalent to the odious writ of *quo warranto*, once used in England by the king and his judges, to destroy the rights of corporations. By our substitute the end is effected, as if Congress had empowered the judges to issue a writ of *quo warranto* directly against the State governments. The only difference between the cases is, that the English *quo warranto* destroyed all the rights of corporations at a blow, and that ours destroys the rights of State governments by degrees. But the end of both proceedings is the same; in England it was to make corporations subservient to royal pleasure; here, it is to make State governments subservient to Federal pleasure. A dependence of corporations upon the will of the king was evidently a subversion of the principles of the Eng-

lish government. If a dependence of State rights upon the will of Congress is also a subversion of the principles of our form of government, may not our *quo warranto* process, under a new name, be a tendency towards tyrannical government, if the true principles of our form of government are as good as those of the English form for the preservation of liberty? The security of the State rights may be as essential to our liberty as the security of corporate rights was supposed to be in England; and a consolidation of States subservient to Congress, as dangerous to it as a consolidation of corporations into a subserviency to royal sovereignty; especially if a consolidated republic over our vast territories should turn out to be impracticable. These writs of error are as good instruments for establishing the property-transferring policy as the *quo warranto* was in England. For this purpose they have been used in the bank and lottery cases to come at the money or property of the people." See also *Construction Construed and Constitution Vindicated*, by the same author.

In a letter to James Monroe,

<sup>8</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264. For the contrary view see *Hunter v. Martin*, 4 Mun. (Va.) 1; *Padelford v. Mayor*, 14 Ga. 438; *Piqua Bank v. Treasurer of Miami*

*County*, 6 Ohio St. 342; *Johnson v. Gordon*, 4 Cal. 768 (1854); overruled by *Ferris v. Carver*, 11 Cal. 175; *Hart v. Burnett*, 26 Cal. 169; Cal. Statutes of 1855, p. 80. See *Greely v. Townsend*, 25 Cal. 604, 618.

Where a Federal question was properly raised and decided adversely to the party raising it, the Supreme Court will take jurisdiction of a writ of error to review a judgment in an action of *quo warranto* affecting the office of Governor of a State;<sup>9</sup> and of a writ of error to review an order denying a mandamus sought to compel the State Secretary of State to issue notices of an election of Presidential electors under a statute claimed to be still in force because of the alleged unconstitutionality of a repealing act which provided for a new method of election to such offices.<sup>10</sup> It is "argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a Presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the State board of canvassers, the legislature in joint convention, and the Governor, or, finally, the Congress."<sup>11</sup> "The question of the validity of this act, as presented by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as reviewed by our own."<sup>12</sup>

A writ of error to a State court is not allowed as a matter of right.<sup>13</sup> The usual practice is to submit the record of the State court to a justice of the Supreme Court, whose duty it then is to ascertain upon examination whether the case upon the face

Thomas Jefferson said: "It is of immense consequence that the States retain as complete authority as possible over their own citizens. The withdrawing themselves under the shelter of a foreign jurisdiction is so subversive of order and so pregnant of abuse, that it may not be amiss to consider how far a law of *præmunire* should be revived and modified, against all citizens who attempt to carry their causes before any other than the State courts, in cases where those courts have no right to their cognizance. A plea to the jurisdiction of the courts of their State, or a reclamation of a foreign jurisdiction

if adjudged valid, would be followed by the punishment of *præmunire* for the attempt." Jefferson's Works, 200. See the message of the Governor of Texas, January 21, 1891, quoted in *Mercantile Trust Co. v. Texas & P. Ry. Co.*, 51 Fed. R. 529, 533, 534.

<sup>9</sup> *Boyd v. Nebraska ex rel. Thayer*, 148 U. S. 185.

<sup>10</sup> *McPherson v. Blacker*, 146 U. S. 1.

<sup>11</sup> Mr. Chief Justice Fuller in *McPherson v. Blacker*, 146 U. S. 1, 24.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Twitchell v. Commonwealth*, 7 Wall. 821; *Spies v. Illinois*, 123 U. S. 131, 143.



of the record will justify the allowance of the writ.<sup>13</sup> He may refer the application to the whole court for decision as to the propriety of the issue of the writ.<sup>14</sup> The Supreme Court will consider no application for a writ of error, unless a justice of the court has indorsed on the record a request that the application be made to the full bench.<sup>15</sup> The application may also be made to the presiding judge of the State court to which the writ of error is addressed.<sup>16</sup> The writ will be denied if there is no Federal question involved, or if the decision complained of was, as regards the Federal question, so plainly right as not to require argument.<sup>17</sup> The application for a writ of error, if made to a single justice, is usually *ex parte*. When made to the full court, usually both sides are heard.<sup>18</sup>

A judgment which orders a new trial<sup>19</sup> or any further proceedings<sup>20</sup> cannot be thus reviewed. A judgment unconditionally dismissing a complaint, when nothing more is requisite to complete the dismissal, may thus be reviewed.<sup>21</sup> What constitutes a final judgment, decree, or order is explained in another section.<sup>22</sup> The term "suit" as used in this statute applies to any proceeding in a court of justice in which a person pursues the remedy which the law affords him;<sup>23</sup> and includes an application for a writ of mandamus,<sup>24</sup> prohibition,<sup>25</sup> or *habeas corpus*.<sup>26</sup>

A writ of error may be issued by the Supreme Court of the

<sup>13</sup> Ibid.

<sup>14</sup> Twitchell v. Commonwealth, 7 Wall. 321; Spies v. Illinois, 123 U. S. 131, 143; In re Kemmler, 136 U. S. 436, 437.

<sup>15</sup> In re Ingalls, 130 U. S. 548.

<sup>16</sup> Sheppard v. Wilson, 5 How. 210; Bartemeyer v. Iowa, 14 Wall. 26.

<sup>17</sup> Spies v. Illinois, 123 U. S. 131, 166; Brooks v. Missouri, 124 U. S. 394.

<sup>18</sup> Spies v. Illinois, 123 U. S. 131; In re Kemmler, 136 U. S. 436, 437.

<sup>19</sup> Houston v. Moore, 3 Wheat. 433; Parcels v. Johnson, 20 Wall. 653; Rankin v. State, 11 Wall. 380.

<sup>20</sup> McComb v. Com'rs of Knox County, 91 U. S. 1; Bostwick v. Brinkerhoff, 106 U. S. 3; Gibbons v. Ogden, 6 Wheat. 448; Meagher v. Minn. Thr.

Mfg. Co., 145 U. S. 608; Cincinnati St. Ry. Co. v. Snell, 179 U. S. 395.

<sup>21</sup> Com'rs of Tippecanoe County v. Lucas, 93 U. S. 108.

<sup>22</sup> *Infra*, § 508.

<sup>23</sup> Weston v. Charleston, 2 Pet. 449; Aldrich v. Aetna Co., 8 Wall. 491.

<sup>24</sup> Hartman v. Greenhow, 102 U. S. 672; McPherson v. Blacker, 146 U. S. 1; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57.

<sup>25</sup> Weston v. Charleston, 2 Pet. 449.

<sup>26</sup> Kurtz v. Moffitt, 115 U. S. 487. But see the opinion of Thompson, J., in Holmes v. Jennison, 14 Pet. 540, 586. The writ was dismissed when brought to review the order of a judge in such a case. McKnight v. James, 155 U. S. 685; Clarke v. McDade, 165 U. S. 168.

United States to a judgment of an inferior State court which, by the laws of the State, cannot be reviewed in the highest State court.<sup>27</sup> When, however, the plaintiff in error has a right to a review of the judgment in another court of the State, no writ of error can be obtained till after such review has been had;<sup>28</sup> even though the judgment of the inferior State court is in accordance with what was decided by the highest State court in a former appeal.<sup>29</sup> The writ should be directed to the court in which the final judgment was rendered, by whose process it is to be executed, and where the record remains, although a higher court has considered the case upon appeal or writ of error, and sent down a *remittitur* or rescript accordingly.<sup>30</sup> In the latter case, the writ may be addressed to the highest court, and seek through its instrumentality to obtain the record from the inferior court having it in keeping;<sup>31</sup> but it is the safer practice to address the writ to the court which has the record.<sup>32</sup> If the clerk of the State court refuses to transmit a copy of the record in obedience to the writ of error, he may be compelled to do so by an order<sup>33</sup> or a mandamus,<sup>34</sup> even though the State court forbade him to transmit the record;<sup>35</sup> but the clerk will not be thus compelled to transmit a copy of the record after a writ of error has been allowed but before it is issued.<sup>36</sup>

The writ of error to a State court must, like the writ to a Circuit Court, be accompanied by a citation and a bond.<sup>37</sup> The citation must be signed and the bond approved by the chief justice, judge or chancellor of the court to which the writ is addressed, or by a justice of the Supreme Court of the United

<sup>27</sup> *Downham v. Alexandria*, 9 Wall. 659; *Gregory v. McVeigh*, 23 Wall. 294; *Miller v. Joseph*, 17 Wall. 655.

<sup>28</sup> *Downham v. Alexandria*, 9 Wall. 659; *Miller v. Joseph*, 17 Wall. 655; *Gregory v. McVeigh*, 23 Wall. 294.

<sup>29</sup> *Fisher v. Perkins*, 122 U. S. 522; *Gt. Western Tel. Co. v. Burnham*, 162 U. S. 889.

<sup>30</sup> *Gelston v. Hoyt*, 8 Wheat. 246; *Kanouse v. Martin*, 15 How. 198; *M'Guire v. Commonwealth*, 8 Wall. 882; *Polleys v. Black R. L. Co.*, 118 U. S. 81.

<sup>31</sup> *Atherton v. Fowler*, 91 U. S. 143, 147.

<sup>32</sup> *Ibid.* Where an application to the highest court of the State for a writ of error to an inferior court has been refused, the writ should be addressed to the inferior court. *Bacon v. Texas*, 163 U. S. 207; *Stanley v. Schwalby*, 162 U. S. 255.

<sup>33</sup> *U. S. v. Booth*, 18 How. 477.

<sup>34</sup> *U. S. v. Gomez*, 8 Wall. 752.

<sup>35</sup> *U. S. v. Booth*, 18 How. 477.

<sup>36</sup> *Ex parte Ralston*, 119 U. S. 618.

<sup>37</sup> U. S. R. S., §§ 999, 1000. See *infra*, § 509.

States.<sup>38</sup> Where the order allowing the writ of error states that the chief justice is absent, and is signed by a judge as presiding judge of the State court, it will be presumed that the writ was properly allowed.<sup>39</sup> The defendant in error must have at least thirty days' notice before the hearing of the cause.<sup>40</sup>

When it is desired to secure the right to review the decision of a State court in the Supreme Court of the United States, it is the safer practice to make it appear distinctly on the record, by a statement either in the pleadings, or as the ground of an objection to the admission of evidence, or in support of an offer of evidence, or a request to charge, that a Federal question is involved.<sup>41</sup> This is not, however, indispensable, if the Supreme Court can see by an examination of the record that the Federal question was raised and decided adversely to the plaintiff in error.<sup>42</sup> The opinion of the State court, if properly authenticated, may be examined to see what questions were decided.<sup>43</sup> A

<sup>38</sup> U. S. R. S., §§ 999, 1000; *Gleason v. Florida*, 9 Wall. 779; *Butler v. Gage*, 188 U. S. 52.

<sup>39</sup> *Butler v. Gage*, 188 U. S. 52, 56.

<sup>40</sup> U. S. R. S., § 999.

<sup>41</sup> *Curtis on Jurisdiction of United States Courts*, 87-89; *Zadig v. Baldwin*, 166 U. S. 485; *Oxley Stave Co. v. Butler County*, 166 U. S. 648. It is not necessary to state specifically the particular provision of the Constitution of the United States upon which the party relies. *Bridge Proprietors v. Hoboken L. & I. Co.*, 1 Wall. 116; *Furman v. Nichol*, 8 Wall. 44; *Columbia Water Power Co. v. Columbia El. St. Ry., Lt. & P. Co.*, 172 U. S. 475, 485. But a general claim below that a statute is unconstitutional is insufficient, since it may have called the attention of the court only to the State Constitution. *Endowment & Ben. Ass'n v. Kansas*, 120 U. S. 108; *Miller v. Cornwall R. Co.*, 168 U. S. 131. It seems that a claim that a statutory proceeding is not due process of law is insufficient unless reference is specifically made to the Fourteenth amendment. *Bol-*

*len v. Nebraska*, 176 U. S. 88. So when the plaintiff in error had claimed protection below under the Fifth and Seventh amendments to the Federal Constitution, which do not apply to the States, he was not allowed in the Supreme Court of the United States to claim that the statute in question was obnoxious to the Fourteenth amendment. *Chapin v. Fye*, 179 U. S. 127.

<sup>42</sup> *Furman v. Nichol*, 8 Wall. 44; *Crowell v. Randell*, 10 Pet. 368; *Armstrong v. Treas. of Athens County*, 16 Pet. 281; *Beer Co. v. Massachusetts*, 97 U. S. 25. See *Roby v. Colehour*, 146 U. S. 153; *Green Bay & M. Canal Co. v. Patten P. Co.*, 172 U. S. 58.

<sup>43</sup> *Murdock v. Memphis*, 20 Wall. 590; *Gross v. U. S. Mortgage Co.*, 108 U. S. 477; *Adams County v. B. & Mo. R. Co.*, 112 U. S. 123, 129; *Philadelphia F. Ass'n v. New York*, 119 U. S. 110, 116; *Walter A. Wood Co. v. Skinner*, 139 U. S. 293, 295. The opinion cannot, however, supply facts which are not contained in the record or a bill of exceptions. *Loeb*

certificate of the presiding justice of the State court or a certificate of that court may also be examined for that purpose.<sup>44</sup> But neither of these is conclusive.<sup>45</sup> If the question was not raised until a motion for a rehearing, no writ of error will lie,<sup>46</sup> unless the rehearing was granted.<sup>47</sup> A mention of a Federal question in a petition for a writ of error, or in an assignment of errors,<sup>48</sup> after judgment by the State court,<sup>49</sup> is insufficient to give the Supreme Court jurisdiction. When it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, the Supreme Court will dismiss the writ of error.<sup>50</sup>

*v. Columbia Tp. Trustees*, 179 U. S. 472, 482; *England v. Gebhardt*, 112 U. S. 502, 505, 506.

<sup>44</sup> *Murdock v. Memphis*, 20 Wall. 590, 598; *Johnson v. Risk*, 137 U. S. 300, 307; *Roby v. Colehour*, 146 U. S. 153. "Such certificate is insufficient to give us jurisdiction where it does not appear in the record, and that its office is to make more certain and specific what is too vague and general in the record." *Brown, J., in Yazoo & Miss. R. Co. v. Adams*, 180 U. S. 41, 48.

<sup>45</sup> *Adams County v. B. & Mo. R. R. Co.*, 112 U. S. 123, 129; *Gross v. U. S. Mortgage Co.*, 108 U. S. 477; *Roby v. Colehour*, 146 U. S. 153; *Powell v. Brunswick County*, 150 U. S. 438; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63; *Yazoo & Miss. R. Co. v. Adams*, 180 U. S. 41, 48.

<sup>46</sup> *Texas & P. Ry. Co. v. So. Pac. Ry. Co.*, 137 U. S. 48; *Turner v. Richardson*, 180 U. S. 87.

<sup>47</sup> *Mallett v. North Carolina*, 181 U. S. 589, 592.

<sup>48</sup> *Leeper v. Texas*, 139 U. S. 462.

<sup>49</sup> *Chapin v. Fye*, 179 U. S. 127.

<sup>50</sup> *Eustis v. Bolles*, 150 U. S. 361, 370; *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556; *Murdock v. Memphis*, 20 Wall. 590; *Adams County v. B. & M. R. R. Co.*, 112 U. S. 123; *De Sausure v. Gaillard*, 127 U. S. 216; *Hopkins v. McLure*, 133 U. S. 880; *Hale*

*v. Akers*, 132 U. S. 554; *Blount v. Walker*, 134 U. S. 607; *Johnson v. Risk*, 137 U. S. 300; *Beaupré v. Noyes*, 138 U. S. 397; *Hammond v. Johnston*, 142 U. S. 78; *Yesler v. Washington Harbor Line Com'rs*, 146 U. S. 646; *Seeberger v. McCormick*, 175 U. S. 274. Where the State court held that the plaintiff in error was estopped from raising the constitutional question, the writ of error was dismissed. *Eustis v. Bolles*, 150 U. S. 361; *Pierce v. Somerset Ry. Co.*, 171 U. S. 641; *Rutland R. Co. v. Central Vt. R. Co.*, 159 U. S. 630; *Moran v. Horsky*, 178 U. S. 205; *Pittsburgh & L. A. I. Co. v. Cleveland Min. Co.*, 178 U. S. 270, 279. The Supreme Court refused to review a decision of a State court which denied a motion to punish a party for a contempt. *Newport Light Co. v. Newport*, 151 U. S. 527. Where it is claimed that the obligation of a contract has been impaired by a State law, the Supreme Court of the United States may pass upon the question whether any contract was made, *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486; and upon the construction of the contract. *Columbia Water Power Co. v. Columbia El. Ry., L. & P. Co.*, 172 U. S. 475; *New Orleans Water Co. v. Louisiana Sugar Co.*, 125 U. S. 18, 38, per Gray, J.: (1) "When the State court decides against a right claimed

Where there is a Federal question, but the decision may have been on another independent ground, and on which ground the judgment was based does not appear, then if the independent ground was clearly invalid and insufficient to sustain the judgment, the Supreme Court will take jurisdiction of the case, because when put to inference as to what points the State court decided, it ought not to assume that the judgment was based upon grounds clearly untenable;<sup>51</sup> but where a defense is distinctly made, resting on local statutes, the Supreme Court will not, in order to reach a Federal question, resort to critical conjecture as to the action of the State court in the disposition of such defense.<sup>52</sup> When the Supreme Court is of the opinion that the Federal question was erroneously decided, it will still affirm the judgment, if it appears that on another ground, even if such ground were not considered by the State court, the decision was correct.<sup>53</sup> It will not consider an independent constitutional question which appears upon the facts, but was

under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction." (2) "When the existence and construction of a contract are undisputed, and the State court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction." (3) "When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the right affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment." (4) "So, when the State court upholds the subsequent law on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because,

if it did, the subsequent law cannot be upheld."

In *McCullough v. Virginia*, 179 U. S. 102, the plaintiff in error claimed that certain legislation subsequent to his contract impaired the obligation of the same. The State Court of Appeals, without expressly passing upon the validity of such legislation, gave substantial effect to the same by holding that the original contract was void and could not be enforced. The Supreme Court of the United States took jurisdiction and reversed the judgment. But see the dissenting opinion of Peckham, J., and *Powell v. Brunswick County*, 150 U. S. 433; *Bacon v. Texas*, 163 U. S. 207; *St. Paul & M. M. Ry. Co. v. Todd County*, 142 U. S. 282.

<sup>51</sup> *Klinger v. Missouri*, 18 Wall. 257; *Johnson v. Risk*, 137 U. S. 300, 307.

<sup>52</sup> *Johnson v. Risk*, 137 U. S. 300, 307.

<sup>53</sup> *Murdock v. Memphis*, 20 Wall. 590, 636. See *Walter A. Wood Co. v. Skinner*, 139 U. S. 293, 295.

not raised below.<sup>54</sup> In a proper case the decision of the State court upon a question of fact will be reviewed.<sup>55</sup> The amount of the matter in dispute in the State court is immaterial to the right of review by the Supreme Court of the United States.<sup>56</sup> Otherwise, writs of error to State courts and the practice and proceedings under them are substantially similar to writs of error to Circuit Courts of the United States, and the practice and proceedings thereunder.<sup>57</sup>

**§ 501. Writs of error from and appeals to the Circuit Courts of Appeals.**—The Evarts Act which creates the Circuit Courts of Appeals provides: “That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed, from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts. But all appeals by writ of error or otherwise, from said District Courts, shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States, or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same.”<sup>1</sup> “That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital or otherwise infamous crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the Constitution or

<sup>54</sup> *Dewey v. Des Moines*, 173 U. S. 193; *Chapin v. Fye*, 179 U. S. 127.

<sup>55</sup> *Lloyd v. Matthews*, 155 U. S. 222. But see *Dower v. Richards*, 151 U. S. 658.

<sup>56</sup> *Buel v. Van Ness*, 8 Wheat. 312.

<sup>57</sup> U. S. R. S., § 1003.

§ 501. <sup>1</sup> 26 St. at L., ch. 517, p. 827, § 4.



law of a State is claimed to be in contravention of the Constitution of the United States. Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.”<sup>2</sup>

“That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law. And the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases.”<sup>3</sup>

“That where, upon a hearing in equity in a District Court or a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver to the Circuit Court of Appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or by the appellate court or a judge thereof during the pendency of such appeal: And provided further, that the court below may in its discretion require as a condition of the appeal, an additional bond.”<sup>4</sup>

<sup>2</sup> 26 St. at L. 827, § 5.

<sup>3</sup> 26 St. at L. 827, § 6. For the cases in which the decisions are final, see *supra*, § 497, note. Whether a conviction is for a capital crime is said to depend not upon the penalty imposed but upon that which might

have been imposed. *Good Shot v. U. S. (C. C. A.)*, 104 Fed. R. 257.

<sup>4</sup> 26 St. at L. 828, § 7; 31 St. at L. 660; *Rowan v. Ide (C. C. A.)*, 107 Fed. R. 161, 164, per Pardee, J.: “The order or decree continuing an injunction, within the meaning of the stat-

"Whenever, on appeal or writ of error or otherwise, a case coming from a District or Circuit Court shall be reviewed and determined in the Circuit Court of Appeals, in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District or Circuit Court for further proceedings to be there taken in pursuance of such determination."<sup>5</sup>

"That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided, however,* that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error, in such cases, taken to or sued out from the Circuit Courts of Appeals. And all provisions of law now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error, provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error. And any judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties

ute, is an order or decree which has vitality, affecting in some way the rights of the parties, and without which the injunction would either cease to have force or be enlarged or limited in scope. Frequently orders of injunction, under the law and the equity rules, or by terms inserted by the court or judge, are made to expire at specific dates or on the happening of specific events, and in such cases orders continuing the injunction in force are necessary. See § 719, R. S., and Equity Rule 55. An order or decree refusing to dissolve or to discharge or to vacate an injunction is not an order continuing an injunction, within the meaning of the amendatory act." *Heinze v. Butte &*

*B. Consol. Min. Co. (C. C. A.), 107 Fed. R. 165. There is no appeal from an interlocutory order denying an injunction. Nat. Auto. Mach. Co. v. Auto. W. L. & Gr. Co. (C. C. A.), 105 Fed. R. 670. In Jack v. State ex rel. Cunningham (C. C. A.), 102 Fed. R. 210, it was held that an order directing a party to file a bond conditioned to comply with any subsequent order as to funds theretofore paid, and requiring a receiver previously appointed to hold the property in his hands until a further order, was not appealable. The practice as to appeals from interlocutory orders granting injunctions and appointing receivers is explained *supra*, § 238.*

<sup>5</sup> 26 St. at L. 826, § 10.

as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.<sup>6</sup> That the Circuit Court of Appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.”<sup>7</sup>

“That the Circuit Court of Appeals, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act, shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories, as by this act they may have to review the judgments, orders, and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular Circuits.”<sup>8</sup>

“Writs of error and appeals from the ” District Court of Hawaii are “had and allowed to the Circuit Court of Appeals in the Ninth Judicial Circuit in the same manner as writs of error and appeals are allowed from Circuit Courts to Circuit Courts of Appeals as provided by law.”<sup>9</sup>

The act creating a Court of Appeals for the Indian Territory provides that “writs of error and appeals from the final decision of said appellate court shall be allowed and may be taken to the Circuit Court of Appeals for the Eighth Judicial

<sup>6</sup> 26 St. at L. 827, § 11.

<sup>7</sup> 26 St. at L. 827, § 12; *supra*, §§ 361-368.

<sup>8</sup> 26 St. at L. 829, § 15. The District Court of Alaska is considered as the Supreme Court of a Territory under this statute. *Coquitlam v. U. S.*, 163 U. S. 346. The Circuit Court of Appeals cannot review the decisions of the Supreme Courts of the territories in suits not arising under the patent laws, revenue laws, criminal laws or in admiralty cases, at least when the parties on both sides are citizens of the same Territory. *Aztec Min. Co. v. Ripley*, 151 U. S. 79. *Cf. Badaracco v. Cerf* (C. C. A.), 58 Fed. R. 169. They have no jurisdiction over the

decisions of those courts in capital cases of conviction of a capital crime. *Folsom v. U. S.*, 160 U. S. 121.

<sup>9</sup> 28 St. at L. 397, § 11; *Ansley v. Ainsworth*, 180 U. S. 253. *Cf.* 30 St. at L. 591; and *supra*, § 497. The Circuit Court of Appeals from the Eighth Circuit has no longer jurisdiction to review immediately the decisions of the United States Court of the Indian Territory. *Scott v. Hamner* (C. C. A.), 72 Fed. R. 789. It has been held that it may review the decisions of the Court of Appeals of the Indian Territory in criminal cases, *Harless v. U. S.* (C. C. A.), 88 Fed. R. 97; except in capital cases. *Brown v. U. S.*, 171 U. S. 631.

Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States.”<sup>10</sup>

“(a) The Supreme Court of the United States, the Circuit Court of Appeals of the United States, and the Supreme Courts of the Territories, in vacation and chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia. (b) The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.”<sup>11</sup>

“(a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such an appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.”<sup>12</sup> The Circuit Courts of Appeals have jurisdiction of appeals from and writs of error to judgments of the Circuit and District Courts in suits upon claims against the United States;<sup>13</sup> of appeals from orders and judgments of the Circuit<sup>14</sup> and District<sup>15</sup> Courts and of the district judges<sup>16</sup> upon applications for the writ of

<sup>10</sup> 31 St. at L. 158.

<sup>11</sup> 30 St. at L. 544, 553, § 24. See *supra*, § 494.

<sup>12</sup> *Ibid.*, § 25. See *supra*, § 494.

<sup>13</sup> *Ogden v. U. S.*, 148 U. S. 390; *U. S. v. Coudert* (C. C. A.), 73 Fed. R. 505; *supra*, § 36.

<sup>14</sup> *King v. McLean Asylum of Mass. Gen. Hospital* (C. C. A.), 64 Fed. R. 139.

<sup>15</sup> *U. S. v. Fowkes* (C. C. A.), 53 Fed. R. 13; *Carter v. Roberts*, 177 U. S. 496.

<sup>16</sup> *Webb v. York* (C. C. A.) 74 Fed. R. 753.

*habeas corpus* where the discharge from imprisonment was not sought because of an alleged violation of a right secured by the Constitution or a treaty;<sup>17</sup> of appeals from orders of the Circuit Courts upon appeals to them from decisions of the board of general appraisers;<sup>18</sup> of writs of error to judgments in actions against collectors to recover duties;<sup>19</sup> of appeals from orders of district judges directing the deportation of immigrants;<sup>20</sup> it seems of appeals from orders of District Courts granting warrants for the removal of prisoners to other districts;<sup>21</sup> and of appeals from orders of the Circuit Courts enforcing orders of the Interstate Commerce Commission.<sup>22</sup>

Where the jurisdiction of the court below is questioned and sustained, the Circuit Court of Appeals can review the same although there is no other assignment of error;<sup>23</sup> but where the court of first instance dismisses the case for want of jurisdiction it seems that the Circuit Court of Appeals cannot review the decision.<sup>24</sup> Where the jurisdiction of the Circuit Courts attaches solely by reason of a diversity of citizenship and a constitutional or a treaty question subsequently arises in the case by the defendant's pleading or otherwise, the Circuit Court of Appeals has jurisdiction and must review all the questions decided in the same, and its decision will be final upon the constitutional question as well as upon the other points in the case unless it certifies that or other questions to the Supreme Court, or the Supreme Court reviews it by a *certiorari*;<sup>25</sup> but the decision of the Circuit Court in such case can be reviewed immediately by the Supreme Court, which may pass upon all material questions therein.<sup>26</sup> Where the

<sup>17</sup> *Davis v. Burke* (C. C. A.), 97 Fed. R. 501. See *supra*, §§ 368, 477.

<sup>18</sup> *Passavant v. U. S.*, 148 U. S. 214, 217; *U. S. v. Hopewell* (C. C. A.), 51 Fed. R. 798, 799; *Louisville Pub. Warehouse Co. v. Collector* (C. C. A.), 49 Fed. R. 561.

<sup>19</sup> *Hubbard v. Soby*, 146 U. S. 56.

<sup>20</sup> *U. S. v. Gee Lee* (C. C. A.), 50 Fed. R. 271.

<sup>21</sup> *U. S. v. Fowkes* (C. C. A.), 53 Fed. R. 13, 14.

<sup>22</sup> *Interstate Com. Com'n v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264.

<sup>23</sup> *U. S. v. Jahn*, 155 U. S. 109, 114, 115, quoted *supra*, § 498; *Reliable Incubator Co. v. Stahl* (C. C. A.), 105 Fed. R. 663.

<sup>24</sup> *U. S. v. Jahn*, 155 U. S. 109, 114, 115; *Evans-Snyder-Buel Co. v. McCaskill* (C. C. A.), 101 Fed. R. 658; *Dudley v. Board of Com'rs of Lake County* (C. C. A.), 103 Fed. R. 209.

<sup>25</sup> *Am. Sugar Refining Co. v. New Orleans*, 181 U. S. 277.

<sup>26</sup> *Ibid.*; *Loeb v. Columbia Tp Trustees*, 179 U. S. 472.

plaintiff by a proper pleading shows that the jurisdiction is given to the Circuit Court both by reason of diverse citizenship and also because there is a controversy arising under the Constitution of the United States, it seems that the decision can be reviewed by either the Supreme Court or the Circuit Court of Appeals; but the decision of the latter court is not final; and if the unsuccessful party elects to go there he may have it reviewed by the Supreme Court.<sup>27</sup>

Where the sole ground of Federal jurisdiction is that there is a controversy arising under the Constitution of the United States, the Supreme Court has exclusive jurisdiction to review the same, and it cannot be reviewed by the Circuit Court of Appeals.<sup>28</sup> The taking of a prior appeal to the Circuit Court of Appeals, which has jurisdiction of the same,<sup>29</sup> or, it seems, the prior argument in the Circuit Court of Appeals of an appeal taken subsequently to an appeal to the Supreme Court, waives the latter.<sup>30</sup> Judgments of the Circuit and District Courts can be reviewed by the Circuit Courts of Appeals irrespective of the value of the matter in dispute.<sup>31</sup> Upon appeals in admiralty the Circuit Courts of Appeals may review questions of both fact and law.<sup>32</sup>

The Circuit Courts of Appeals have no power to issue writs of mandamus to compel the District and Circuit Courts to dismiss suits for want of jurisdiction;<sup>33</sup> nor to issue writs of *certiorari* as original process to review final judgments of the Dis-

<sup>27</sup> *Am. Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281, 282.

<sup>28</sup> *Am. Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281.

<sup>29</sup> *Carter v. Roberts*, 177 U. S. 496.

<sup>30</sup> *Robinson v. Caldwell*, 165 U. S. 859. Where one party took a writ of error from the Supreme Court upon the question of jurisdiction and the other from the Circuit Court of Appeals upon the other questions, the Circuit Court of Appeals postponed the argument of the latter until after the former was decided. *No. Pac. R. Co. v. Glaspell* (C. C. A.), 49 Fed. R. 482. See *Pullman's P. C. Co. v. Central Transp. Co.*, 171 U. S. 188; *U. S. v. Jahn*, 155 U. S. 109, 114.

<sup>31</sup> *No. Pac. R. Co. v. Amato*, 144 U. S. 465; *s. c.* in C. C. A., 49 Fed. R. 881. *The Paquete Habana*, 175 U. S. 677, 686. Held *contra* as to District

Courts in *No. Am. Trading & Transp. Co. v. Smith* (C. C. A.), 93 Fed. R. 7.

<sup>32</sup> *The Havilah* (C. C. A.), 48 Fed. R. 684. *The Philadelphian* (C. C. A.), 60 Fed. R. 423. The findings of a commissioner as to value, when the evidence is conflicting and the witnesses have appeared before him, will rarely be disturbed. *The George L. Garlick* (C. C. A.), 107 Fed. R. 542.

<sup>33</sup> *U. S. v. Swan* (C. C. A.), 65 Fed. R. 647; *U. S. v. Severens* (C. C. A.), 71 Fed. R. 768; *supra*, § 863.



strict or Circuit Courts;<sup>24</sup> nor to issue the writ of *habeas corpus* for service outside of the circuit, even, it has been held, to review a decision of a court of a Territory within its circuit.<sup>25</sup>

§ 502. Writs of error from and appeals to the Circuit Courts.—The Act of June 10, 1890, provides: "That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision.

"Such application shall be made by filing in the office of the clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be.

"Thereupon the court shall order the board of appraisers to return to said Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said Circuit Court.

"And within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and such further evidence, with the aforesaid returns, shall constitute the record

<sup>24</sup> *Travis County v. King L. Br. & Mfg. Co.* (C. C. A.), 92 Fed. R. 690; <sup>25</sup> *In re Boles* (C. C. A.), 48 Fed. R. 75; *supra*, § 366. *supra*, § 365.

upon which said Circuit Court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly.”<sup>1</sup> No appeal lies from the decision of the

§ 502. <sup>1</sup> 26 St. at L., ch. 407, § 15, p. 181. See *Louisville Pub. W. Co. v. Collector*, 49 Fed. R. 561, cited *supra*, § 497.

Under this act the following rules have been adopted by the Circuit Court for the Southern District of New York:

“RULE I. Where, in any case, the return of the Board of General Appraisers does not contain, as required by section 15 of the Act of June 1, 1890, a certified statement of some particular fact or facts involved in the case, before any order will be granted by this court for a further or additional return by said board, the applicant must make it appear to the satisfaction of the court (by affidavit or otherwise) either that there was evidence before the board bearing on said issue or issues of fact, or that the applicant at the time of filing his protest, or subsequently, and before the decision by the board, offered to sustain his contention as to such facts by proof.

“RULE II. No order for an additional or further return will be made, where it is made to appear that the protestant had reasonable notice to appear before said Board of General Appraisers and show cause why the decision of the collector should not be affirmed, and after such notice, without proper excuse, he failed to appear in person or by attorney, and he offered no evidence in support of his contentions as presented in his protest, and no such evidence is found in the record and papers in

the case, and none was taken by the board.

“RULE III. When an order is made upon the Board of General Appraisers to return to the Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decisions thereon, the service of the order upon the board shall be accompanied by a copy of the statement of the errors of law and fact complained of, filed in the office of the clerk of the Circuit Court on the application for the order.

“RULE IV. When an order is made under section 15 of the Act of June 1, 1890, for the taking and returning of further evidence on the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, such order shall be understood to embrace further evidence to be offered by the party adverse to the one making the application.

“RULE V. The General Appraiser, to whom, as an officer of the court, it is referred to take and return further evidence, shall assign a day and place for the hearing, and give to the party who made the application a summons for the adverse party to attend at the day and place so appointed. The summons shall be served on the adverse party or his counsel such time previous to the day appointed as the General Appraiser may deem reasonable and may direct. But if no direction is made, the time of service shall not be less

Board of General Appraisers ascertaining and fixing the dutiable value of goods when the board has acted regularly and without fraud or other misunderstanding.<sup>2</sup>

“On any final judgment in a consular court of China or Japan, where the matter in dispute exceeds five hundred dol-

than two days where the parties reside in the city or town where the hearing is to take place; and not less than ten days where the adverse party or his counsel does not reside in such city or town.

“RULE VI. No testimony shall be taken by the General Appraiser except such as shall be relevant to the questions raised in the statement of the errors of law and fact complained of, filed on the application for the order to return the record.

“RULE VII. The parties shall proceed from day to day with the examination of their witnesses before the General Appraiser, unless he shall adjourn for good cause; and the examination of each witness shall proceed from day to day until it is completed; and after his examination is closed, he shall not be again examined to the same facts without the consent of the adverse party, unless the General Appraiser otherwise direct.

“RULE VIII. The General Appraiser shall require the moving party to exhaust his testimony before the introduction of testimony by the adverse party; and after each party closes he shall not introduce further testimony except in rebuttal of new facts presented by the adverse party.

“RULE IX. When one of the parties does not attend at the time and place appointed, the General Appraiser shall be at liberty to proceed *ex parte*.

“RULE X. The General Appraiser may decline to take any testimony which may in his opinion be unneces-

sarily cumulative subject to review by the court, on special application.

“RULE XI. On the examination of a witness before the General Appraiser, if any interrogatory to the witness, or any part of his testimony, is objected to as improper or irrelevant, the General Appraiser shall decide upon the objection. If he decides against the objection he shall note the objection and his decision thereon, and proceed to take down the testimony; but if he decides that the objection is well taken, the testimony shall not be taken down unless it is insisted on by the party against whom the decision is made. If the taking down of the testimony in opposition to his decision is insisted on, such fact shall be noted, and the testimony shall be taken; and in that case the party making the objection may, at the hearing, move to have the objectionable testimony expunged.

“RULE XII. In cases where no provision is made by law, or by these rules, the proceedings before the General Appraiser in cases not provided for by law, or by the written rules of the court, shall be according to the customary practice of this court, as it has heretofore existed.

“RULE XIII. Upon the completion of the record on application for review of the decisions of the Board of United States General Appraisers, under section 15 of the Act of June 10, 1890, either party may notice the case for trial by serving upon the adverse party or his attorney, at least fourteen days before the time appointed for hearing, a notice of

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<sup>2</sup> *Passavant v. U. S.*, 148 U. S. 214.

lars, and does not exceed two thousand five hundred dollars, exclusive of costs, an appeal shall be allowed to the minister in such country, as the case may be. But the appellant shall comply with the conditions established by general regulations. And the ministers are hereby authorized and required to receive, hear, and determine such appeals.”<sup>3</sup>

“On any final judgment in any consular court of China or Japan, where the matter in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars, an appeal shall be allowed to the Circuit Court for the District of California,

trial for the first Monday of any month (except the months of July, August, and September).”

The return has been compared to a master's report. In *re Van Blankensteyn*, 56 Fed. R. 474. In a case where the only fact certified by the appraisers was that “silk is the component material of chief value,” it was held that the return should be sent back for a further statement. Judge Lacombe then said: “Had the board also certified that the articles were correctly described in the invoice or entry, or in the appraisers' return, there might be sufficient; but, as it is, there is nothing to show what the articles really are.” In *re Dieckerhoff*, 45 Fed. R. 285. In a case where the return stated that “all the facts involved in said case, so far as ascertained by the board, are fully stated in [a certain opinion] and decision annexed thereto; and in such opinion it was stated, that inasmuch as some of the questions raised by protest were “understood to be now pending in the United States courts, [they] do not deem it advisable to enter into the merits of the same, but affirmed the [collector's] assessment of dues;” a further return was ordered. In *re Blumlein*, 45 Fed. R. 226; In *re Downing*, 45 Fed. R. 412. See also *U. S. v. Klingenberg*, 153 U. S. 93; *U. S. v. Jahn*, 155 U. S. 109; *U. S. v. Lies*, 170 U. S. 628; *Earnshaw v. U. S.*, 146 U. S. 60; *Apgar v. U. S.*

(C. C. A.), 78 Fed. R. 832; *Marine v. Lyon* (C. C. A.), 65 Fed. R. 992; *U. S. v. Davis* (C. C. A.), 54 Fed. R. 147; *In re Marquand*, 57 Fed. R. 189; *U. S. v. Rosenwald* (C. C. A.), 67 Fed. R. 823; *White v. U. S.* (C. C. A.), 72 Fed. R. 251; *U. S. v. Lies*, 74 Fed. R. 546; *U. S. v. Kenworthy* (C. C. A.), 68 Fed. R. 904; “*Zante Currants*,” 73 Fed. R. 183; *Sang Lung v. Jackson*, 85 Fed. R. 502; *Foster v. Vocke*, 60 Fed. R. 745; *In re Chase*, 50 Fed. R. 695; *In re Wyman*, 45 Fed. R. 469; *In re Sternbach*, 44 Fed. R. 413; *In re Sherman*, 49 Fed. R. 224; *s. c. sub nom. In re Collector of Customs* (C. C. A.), 55 Fed. R. 276; *In re Kursheedt Mfg. Co.*, 49 Fed. R. 633; *s. c.*, 54 Fed. R. 159; *In re Muser*, 49 Fed. R. 831; *In re Crowley*, 50 Fed. R. 465; *s. c.* (C. C. A.), 55 Fed. R. 283; *In re Bache*, 54 Fed. R. 371; *s. c.*, *U. S. v. Bache* (C. C. A.), 59 Fed. R. 762; *Mexican Onyx & Tr. Co. v. U. S.*, 66 Fed. R. 732; *In re Buffalo Natural Fuel Co.*, 73 Fed. R. 191; *s. c.*, *U. S. v. Buffalo N. G. F. Co.* (C. C. A.), 78 Fed. R. 110; *Stern v. U. S.*, 77 Fed. R. 607; *Lesser v. U. S.*, 89 Fed. R. 197; *U. S. v. Hahn*, 91 Fed. R. 755; *Morris E. & A. Ex. Co. v. U. S.*, 94 Fed. R. 643.

<sup>3</sup>U. S. R. S., § 4092. It has been held that the statutes creating these consular courts and giving them civil and criminal jurisdiction are constitutional. In *re Ross*, 140 U. S. 453.

and upon such appeal a transcript of the libel, bill, answer, depositions, and all other proceedings in the cause, shall be transmitted to the Circuit Court, and no new evidence shall be received on the hearing of the appeal; and the appeal shall be subject to the rules, regulations, and restrictions prescribed in law for writs of error from District Courts to Circuit Courts.”<sup>4</sup>

“On any final judgment of the minister to China, or to Japan, given in the exercise of original jurisdiction, where the matter in dispute, exclusive of costs, exceeds two thousand five hundred dollars, an appeal shall be allowed to the Circuit Court, as provided in the preceding section.”<sup>5</sup>

“When any final judgment of the minister to China, or to Japan, is given in the exercise of original or of appellate criminal jurisdiction, the person charged with the crime or offense, if he considers the judgment erroneous in point of law, may appeal therefrom to the Circuit Court for the District of California; but such appeal shall not operate as a stay of proceedings unless the minister certifies that there is probable cause to grant the same, when the stay shall be such as the interests of justice may require.”<sup>6</sup>

“The Circuit Court for the District of California is authorized and required to receive, hear, and determine the appeals provided for in this title, and its decisions shall be final.”<sup>7</sup>

The Evarts Act provides that no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts.<sup>8</sup> The Circuit Courts still retain their general supervisory jurisdiction over causes and questions arising in the District Courts in bankruptcy, under the Act of 1867;<sup>9</sup> but their appellate jurisdiction in bankruptcy has been transferred to the Circuit Courts of Appeal.<sup>10</sup>

<sup>4</sup> U. S. R. S., § 4093; *The Ping-On v. Blethen*, 11 Fed. R. 607; *s. c.*, 7 Sawyer, 483; *The Spark v. Lee Choi Chum*, 1 Sawyer, 713.

<sup>5</sup> U. S. R. S., § 4094.

<sup>6</sup> U. S. R. S., § 4095.

<sup>7</sup> U. S. R. S., § 4096.

<sup>8</sup> 26 St. at L. 517, § 4. The former appellate jurisdiction of the Circuit Courts is described in § 479 of the second edition of this book.

<sup>9</sup> *In re Starr*, 56 Fed. R. 142.

<sup>10</sup> *Duff v. Carrier (C. C. A.)*, 55 Fed. R. 433.

§ 503. **Judgments, orders, and decrees which may be reviewed by writs of error or appeals.**—An interlocutory order or decree granting or continuing an injunction in equity or appointing a receiver in a District or Circuit Court, in a case in which an appeal from a final judgment may be taken, under the provisions of the Evarts Act, to the Circuit Court of Appeals, may be reviewed by such Circuit Court of Appeals on appeal, provided the appeal be taken within thirty days from the entry of such order or decree.<sup>1</sup> Otherwise, neither the Circuit Court of Appeals, nor the Supreme Court, has jurisdiction to review by writ of error or appeal any order, judgment, or decree which is not final.<sup>2</sup>

A judgment, or decree, to be final for the purpose of an appeal, must terminate the litigation, so that on affirmance by the court of review, the court below will have nothing to do but to execute the order, judgment, or decree which it has already ordered.<sup>3</sup>

§ 503. <sup>1</sup> 26 St. at L. 828, § 7; 31 St. at L. 660; *supra*, §§ 238, 501.

<sup>2</sup> *McLish v. Roff*, 141 U. S. 661; *Chicago, St. P., M. & O. Ry. Co. v. Roberts*, 141 U. S. 690.

<sup>3</sup> *Bostwick v. Brinkerhoff*, 106 U. S. 8; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429; *St. L., I. M. & S. R. Co. v. So. Ex. Co.*, 108 U. S. 24; *Ex parte Norton*, 108 U. S. 287; *Winthrop L. Co. v. Meeker*, 109 U. S. 180; *Mower v. Fletcher*, 114 U. S. 127.

The following judgments and orders at law have been held *not* final, and consequently not reviewable: A writ of error will not issue to a judgment of voluntary nonsuit, *Evans v. Phillips*, 4 Wheat. 73; although the judge below refused to reinstate the cause after the nonsuit, *U. S. v. Evans*, 5 Cranch, 280; *Welch v. Mandeville*, 7 Cranch, 152; but a writ of error will issue to a judgment entered upon an order directing an involuntary nonsuit, *Elmore v. Grymes*, 1 Peters, 469; *Central Transp. Co. v. Pullman's P. Car Co.*, 139 U. S. 24, 39; or dismissing the

complaint in an action at common law under the Code practice. *Central Transp. Co. v. Pullman's P. Car Co.*, 139 U. S. 24, 39. A writ of error will not issue to a judgment of the highest court of a State remanding a suit to an inferior State court for a new trial, *Johnson v. Keith*, 117 U. S. 199; or for other proceedings in equity. *Winn v. Jackson*, 12 Wheat. 135; *Mayberry v. Thompson*, 5 How. 121; *Holcombe v. McCusick*, 20 How. 552; *Rankin v. State*, 11 Wall. 880; *St. Clair Co. v. Lovington*, 18 Wall. 628; *Parcels v. Johnson*, 20 Wall. 653; *McComb v. Knox Co.*, 91 U. S. 1; *Zeller v. Switzer*, 91 U. S. 487; *Baker v. White*, 92 U. S. 176; *Davis v. Crouch*, 94 U. S. 514; *Bostwick v. Brinkerhoff*, 106 U. S. 8; *Johnson v. Keith*, 117 U. S. 199; *Smith v. Adams*, 180 U. S. 167; *Rice v. Sanger*, 144 U. S. 197; *Brown v. Marion Nat. Bank*, 146 U. S. 610; *Union Mut. Ins. Co. v. Kirchoff*, 160 U. S. 374. By the law of Louisiana and the rule adopted there by the District Court of the United States, a judgment without



A writ of error will issue to a judgment upon which an execution can issue, although the judgment is imperfect and in-

the signature of the judge cannot be enforced, and consequently it is not a final judgment to which a writ of error may issue. *Life & Fire Ins. Co. of N. Y. v. Wilson*, 8 Pet. 291. A decree which in part sustained and in part overruled a demurrer, but which did not dismiss the petition, was held not final, and not reviewable on appeal. *G. W. Tel. Co. v. Burnham*, 162 U. S. 339; *De Armas v. U. S.*, 6 How. 103. A judgment in an action of *quo warranto* sustaining a demurrer, but not including a judgment of ouster, or anything that prevents the exercise of the privileges alleged to have been usurped, is not a final judgment which may be reviewed. *Miners' Bank v. U. S.*, 5 How. 218.

Where a State statute permitted an amendment of a pleading after a demurrer had been sustained, it was held that a judgment of the State sustaining a demurrer to a petition was not a final judgment, *Clark v. Kansas City*, 172 U. S. 884; until it appeared that the plaintiff's right to amend had been abandoned or taken away. *Clark v. Kansas City*, 176 U. S. 114.

The certificate by the Circuit Court of the District of Columbia of a finding of fact by a jury upon an issue sent by the Orphans' Court, which is as conclusive as a verdict upon the court to which it is certified, is not a final judgment to which a writ of error will issue for error in instructing the jury, since it does not put an end to the suit in the Orphans' Court. *Van Ness v. Van Ness*, 6 How. 62. A writ of error will not issue to the decision of the court below upon a motion to enter an *exoneretur* of bail. *Morsell v. Hall*, 13 How. 212. Nor to the judgment of a State court, which is only a direction to transfer

the possession of a railroad to the Comptroller-General of the State. *Hand v. Hagood*, 131 U. S. clxxxi. Nor to an order of a District Court refusing to grant a certificate of reasonable cause for filing an information for alleged violation of revenue laws. *U. S. v. Frerichs' Pl.*, 106 U. S. 160. Nor to an order of the Supreme Court of a Territory, dismissing a writ of error to a District Court because of the failure of the plaintiff in error to file the transcript and have the cause docketed within the time required by law. *Harrington v. Holler*, 111 U. S. 796. Nor to an order, quashing an inquisition to assess damages when another inquisition might be taken under the statute. *Chesapeake & O. Canal Co. v. Union Bank of Georgetown*, 8 Pet. 259. Nor, it has been held, to an order quashing an attachment. *Atl. Lumber Co. v. L. Bucki & Son L. Co. (C. C. A.)*, 92 Fed. R. 864; *Hamner v. Scott (C. C. A.)*, 60 Fed. R. 343. But see *Standley v. Roberts (C. C. A.)*, 59 Fed. R. 836; *Salmon v. Mills (C. C. A.)*, 66 Fed. R. 32; *U. S. ex rel. Mudsill Min. Co. v. Swan (C. C. A.)*, 65 Fed. R. 647. Nor to an order in North Carolina directing the return to the defendant of property replevied. *Porter v. Davidson (C. C. A.)*, 68 Fed. R. 257. Nor to an order setting aside a sheriff's return to an execution and awarding an alias execution. *Wells v. McGregor*, 18 Wall. 188. Nor to an order denying a motion to quash an execution. *Boyle v. Zacharie*, 6 Pet. 648; *Evans v. Gee*, 14 Pet. 1; *Amis v. Smith*, 16 Pet. 303; *McCargo v. Chapman*, 20 How. 555; *Tracy v. Holcombe*, 24 How. 426; *Loeber v. Schroeder*, 149 U. S. 580. Nor to an order denying a motion to quash a *fiery facias*. *Loeber v. Schroeder*, 149 U. S. 580. Nor to a judgment in the court below

formal.<sup>4</sup> A judgment of dismissal with costs is final and may be reviewed.<sup>5</sup> "If by any direction the entire cause is in fact determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, sub-

on a writ of error *coram vobis*. *Pickett v. Legerwood*, 7 Pet. 144. Nor, it seems, to an order of the court below, made on a motion for a writ of restitution. *Barton v. Forsyth*, 5 Wall. 190; *Dredge v. Forsyth*, 2 Black, 568; *Smith v. Trabue*, 9 Pet. 4. Nor, it was held, to an order dismissing a writ of error for want of prosecution. *Harrington v. Holler*, 111 U. S. 796. Nor to an order granting or denying a motion for a new trial, except to review the jurisdiction to grant the same, *Manning v. German Ins. Co. (C. C. A.)*, 107 Fed. R. 52; *Ayers v. Watson*, 187 U. S. 584; *Houston v. Moore*, 8 Wheat. 433; or affirming an order granting or denying such a motion. *Beaupré v. Noyes*, 138 U. S. 397, 402. Nor to an order remanding a cause to a State court for want of jurisdiction. *Chicago, St. P., M. & O. R. Co. v. Roberts*, 141 U. S. 690; *Joy v. Adelbert College*, 146 U. S. 355; *supra*, § 393. Nor to an order of a District or Circuit Court appointing commissioners in a condemnation proceeding. *So. Ry. Co. v. Postal Tel. Co. (C. C. A.)*, 93 Fed. R. 393; *Luxton v. No. R. Br. Co.*, 147 U. S. 337; *supra*, § 381. But see *Wheeling & O. Br. Co. v. Wheeling*, 138 U. S. 287. Nor to an order overruling a demurrer to an interplea. *Robinson v. Belt (C. C. A.)*, 56 Fed. R. 328. But see *Salmon v. Mills (C. C. A.)*, 66 Fed. R. 32.

<sup>4</sup> *Wilson v. Daniel*, 3 Dall. 401. See *Blumenthal v. Shaw (C. C. A.)*, 70 Fed. R. 801. A writ of error will issue to an order of a Circuit Court striking out an answer, and containing a final judgment for the claim on which

suit was brought; *Fuller v. Claffin*, 93 U. S. 14. To an order in an action of replevin, quashing and vacating the writ, dismissing the action at the plaintiff's costs, and awarding execution because the court has no jurisdiction. *Ex parte Balt. & O. R. Co.*, 108 U. S. 566. To an order dismissing the petition of a creditor who intervenes in an action in which a writ of attachment has been issued and levied. *Gumbel v. Pitkin*, 113 U. S. 545. To an order quashing a writ of garnishment and dismissing the garnishee with costs. *U. S. ex rel. Mudsill Min. Co. v. Swan (C. C. A.)*, 65 Fed. R. 647. To an order distributing the proceeds of a sale under a marshal's levy. *Gumbel v. Pitkin*, 113 U. S. 545. To an order awarding a writ of peremptory mandamus. *Memphis v. Brown*, 94 U. S. 715; *Davies v. Corbin*, 112 U. S. 36. To a judgment of a State court reversing a judgment of an inferior court, and directing the latter court to enter a specified judgment, leaving nothing to the discretion of such inferior court. *Board of Com'rs of Tippecanoe County v. Lucas*, 93 U. S. 108; *Mower v. Fletcher*, 114 U. S. 127. To a judgment of a State court reversing a judgment against a defendant upon the ground that he was entitled to an exemption which he claimed under the Bankruptcy Act, and affirming a judgment against sureties upon the ground that they were not entitled to the benefit of the discharge of their principal. *O'Dowd v. Russell*, 14 Wall. 402. To a judgment of the Supreme Court

<sup>5</sup> *New Orleans R. Co. v. Morgan*, 10 Wall. 256. So is an order of dismissal which contains a judgment for

costs. *Col. E. Ry. Co. v. Union Pac. Ry. Co. (C. C. A.)*, 94 Fed. R. 312.

ject in a proper case to our review, whatever may be its designation."<sup>6</sup>

According to the English Chancery practice a final decree was a decree which completely determined every question arising in the cause; and every decree which reserved the further consideration of any question arising in a cause till the future hearing was interlocutory.<sup>7</sup> Moreover, technically, every decree was considered interlocutory until it was signed and enrolled.<sup>8</sup> Under the Federal Judiciary Acts, a different definition of a final decree in equity has been made. For the purpose of appeals, every decree is considered final which decides the right to property and orders that it be sold or delivered to a party; or creates a lien upon property by the issue of receiver's certificates, or otherwise; or directs a specific sum of money to be paid to a party, or to an intervenor, although by a stranger to the suit or out of a fund in court, provided that the successful party is entitled to compel its immediate execution;<sup>9</sup> or which confirms a sale so that no reversal of any

of Virginia affirming a judgment which sustains proceedings to condemn certain property, adjudges that it was necessary for the petitioner to take the same, and names commissioners to ascertain what would be a just compensation for the respondent, where the Court of Appeals of that State held that the judgment was final and conclusive unless immediately reviewed. *Wheeling & B. Br. Co. v. Wheeling Br. Co.*, 138 U. S. 287. But see *Luxton v. North River Br. Co.*, 147 U. S. 887; *supra*, § 381. To the final judgment of a court of competent jurisdiction upon a proceeding under section 2326 of the Revised Statutes to determine an adverse claim to mineral land. *Chambers v. Harrington*, 111 U. S. 350. To an order of the Court of Appeals of the District of Columbia affirming an order admitting a will to probate. *Ormsby v. Webb*, 134 U. S. 47.

<sup>6</sup> *Board of Com'rs of Tippecanoe County v. Lucas*, 93 U. S. 108, 113.

<sup>7</sup> *Seton on Decrees* (4th ed.), 2.

<sup>8</sup> *Forum Romanum*; *Seton on Decrees* (4th ed.), 2; *supra*, §§ 318, 325b.

<sup>9</sup> *Taney, C. J.*, in *Forgay v. Conrad*, 6 How. 201, 204; *Michoud v. Girod*, 4 How. 503; *Ray v. Law*, 3 Cranch, 179; *Whiting v. Bank of U. S.*, 18 Pet. 6; *Wabash & E. Canal Co. v. Beers*, 1 Black, 54; *Bronson v. Railroad Co.*, 2 Black, 524; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 440; *Thomson v. Dean*, 7 Wall. 342; *Railroad Co. v. Bradleys*, 7 Wall. 575; *Stovall v. Banks*, 10 Wall. 583; *French v. Shoemaker*, 12 Wall. 86; *Marin v. Lalley*, 17 Wall. 14; *Trustees v. Greenough*, 105 U. S. 527; *Farmers' Loan & Tr. Co., Petitioner*, 129 U. S. 206; *Lewisburg Bank v. Sheffey*, 140 U. S. 445; *Chicago & V. R. Co. v. Fosdick*, 106 U. S. 47, 83; *Sage v. Railroad Co.* 96 U. S. 712; *Hoffman v. Knox* (C. C. A.), 50 Fed. R. 484. But see *Jacksonville, T. & K. Ry. Co. v. American Cont. Co.*, 57 Fed. R. 66; *Edgell v. Felder* (C. C. A.), 99 Fed. R. 324; *Central Tr. Co. v. Marietta & N. Y. Ry. Co.* (C. C.

order subsequently made would divest the title, even though the consideration of other matters arising upon the pleadings

A.), 48 Fed. R. 850. But see *McGourkey v. Toledo & O. Ry. Co.*, 146 U. S. 536; *supra*, § 378.

An order setting aside a sale made in violation of an injunction was held to be appealable. *Grant v. Lowe* (C. C. A.), 89 Fed. R. 881. An order of seizure and sale in Louisiana where there was no opposition was held to be a final order. *Boatmen's Sav. Bank v. Wagenspack*, 12 Fed. R. 66. Where the general term of the Supreme Court of the District of Columbia affirmed an order of the special term which determined that the domicile of a decedent was in the District, and that such court had "original jurisdiction in the matter of his estate;" it was held that an appeal could be taken to the Supreme Court of the United States. *Benjamin's Heirs v. Dubois*, 118 U. S. 46. An order reviving a suit in the name of the executor of the deceased plaintiff, for whom a decree was rendered, and investing the substituted plaintiff with all the rights of the original plaintiff to enforce the decree, is appealable, *Terry v. Sharon*, 181 U. S. 40; but not an order reviving a suit that has abated before a final decree in the same. *Mackaye v. Mallory* (C. C. A.), 79 Fed. R. 1. A decree rendered by a district judge in a Circuit Court, in a case where he has no vote, is good until vacated, and therefore appealable. *Baker v. Power*, 124 U. S. 167.

An order on a petition of intervention in a foreclosure suit directing that the petitioner's claim be a charge upon the property and its income, prior to the rights of the mortgagee, *Central Tr. Co. v. Grant Locomotive Works*, 135 U. S. 207; or directing a receiver to purchase certain property which an intervenor claims, *Central Tr. Co. of N. Y. v. Marietta & N. G. Ry. Co.* (C. C. A.), 48 Fed. R. 850, 860;

or directing the receiver to deliver such property to the intervenor, is a final order determining matters separable from the rest of the suit, although the decree of foreclosure and sale on the complainant's bill is entered long afterwards. *Central Tr. Co. of N. Y. v. Marietta & N. G. Ry. Co.* (C. C. A.), 48 Fed. R. 864. A decree which set aside a lease of the property of a corporation and appointed a receiver to manage the corporate affairs, to whom the directors were ordered to deliver the property, books, and papers of the corporation, which provided for an accounting by the defendant directors of the profits and royalties under the lease, but reserved to the court "such further direction as may be necessary to carry the decree into effect, concerning costs, or as may be equitable and just;" was held final, from which an appeal could immediately be taken. *Winthrop L. Co. v. Meeker*, 109 U. S. 180. In a suit by an express company against a railroad company to require the defendant to carry plaintiff's express matter upon payment of reasonable charges, a decree that defendant must carry for reasonable rates, and fixing for the time being the maximum thereof, is final, notwithstanding a reference by interlocutory decree or supplemental order for the settlement of accounts which accrued pending the suit. *St. Louis, L. M. & S. Ry. Co. v. So. Exp. Co.*, 108 U. S. 24; *Missouri, K. & T. Ry. Co. v. Dinsmore*, 108 U. S. 30. Where an assignee in bankruptcy filed a bill to set aside a confession of judgment by the bankrupt and execution sales thereunder, and to restrain the foreclosure of the mortgage given by the bankrupt on the same property upon its reconveyance to him to secure an alleged balance

is reserved "for further consideration" in it.<sup>10</sup> A decree is final which settles all the rights of the parties involved in the pleadings, though it gives leave to either of them to apply at the foot of the decree in relation to any matter not finally determined by it.<sup>11</sup> A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judgment for the costs was entered after their taxation.<sup>12</sup> A decree dismissing a bill as to all matters except one severable from the rest, was held to be a final decree as regards the matters which it then determined.<sup>13</sup>

of purchase-money, and the court found the confessed judgment, execution sale, and mortgage valid, and allowed the foreclosure to proceed, but ordered that any surplus arising therefrom should be paid to the assignee; the decree was held final, and appealable. *Ex parte Norton*, 108 U. S. 237; *Andrews v. Nat. F'y & P. Wks.* (C. C. A.), 73 Fed. R. 516. An order denying permission to a receiver to have a judgment against his corporation set aside was held to be appealable. *Rust v. United Waterworks* (C. C. A.), 70 Fed. R. 129. So was an order fixing the amount of an attorney's lien and directing payment to him of the amount due. *Tuttle v. Claflin* (C. C. A.), 88 Fed. R. 122.

As to appeals from orders denying leave to intervene, see *supra*, § 201a; and *Buel v. Farmers' L. & Tr. Co.* (C. C. A.), 104 Fed. R. 839; *Jones & Laughlins v. Sands* (C. C. A.), 79 Fed. R. 913; *Rust v. United Waterworks Co.* (C. C. A.), 70 Fed. R. 129; *Security Tr. Co. v. Sullivan* (C. C. A.), 77 Fed. R. 778; *Lewis v. Balt. & L. R. Co.* (C. C. A.), 62 Fed. R. 218; *Hamlin v. Toledo, St. L. & K. C. R. Co.* (C. C. A.), 78 Fed. R. 664.

<sup>10</sup> *St. Louis, I. M. & S. R. Co. v. So. Exp. Co.*, 108 U. S. 24; *Mo., K. & T. R. Co. v. Dinsmore*, 108 U. S. 80; *Lewisburg Bank v. Sheffey*, 140 U. S. 445; *Sanders v. Bluefield Works & Imp. Co.* (C. C. A.), 106 Fed. R. 587; *Chase v. Driver* (C. C. A.), 92 Fed.

R. 780; *New Orleans v. Peake* (C. C. A.), 52 Fed. R. 74. But see *Dainese v. Kendall*, 119 U. S. 53; and *infra*, note 13.

<sup>11</sup> *French v. Shoemaker*, 12 Wall. 86.

<sup>12</sup> *Fowler v. Hamill*, 139 U. S. 549.

<sup>13</sup> *Hill v. Chicago & E. R. Co.*, 140 U. S. 52. But see *Keystone Iron Co. v. Martin*, 132 U. S. 91. It has been held that a decree dismissing a bill against one of several defendants sought to be jointly charged is *not* appealable. *Hohorst v. Hamburg Am. Packet Co.*, 148 U. S. 262; *National Bank v. Smith*, 156 U. S. 830. But see *Dainese v. Kendall*, 119 U. S. 53. So where the bill was dismissed as against one defendant who, if liable, would be entitled to a right of subrogation against another whose liability was still undetermined. *Baker v. Old Nat. Bank* (C. C. A.), 91 Fed. R. 449. But a decree dismissing a bill against one defendant was held to be appealable, although no decree had been entered against his co-defendant after an order taking the bill *pro confesso* as to the latter. *Stewart v. Masterson*, 131 U. S. 151. See *Judson v. Courier Co.*, 25 Fed. R. 705. So of a decree dismissing a bill as against the only defendant served with process, although others who were not indispensable parties had not been served with process. *Bradshaw v. Miners' Bank* (C. C. A.), 81 Fed. R. 902. An order dismissing a bill as against two defendants not



It has been held that an order which is purely administrative in its nature, such as an order granting leave to sue a

served with process, who were charged as jointly liable with the defendant served, was held to be *not* appealable. *Beck & Pauli Lith. Co. v. Wacker & B. B. M. Co.* (C. C. A.), 76 Fed. R. 10. See also *Meagher v. Minn. Thr. Co.*, 145 U. S. 608.

It has been held that the following orders and decrees in equity are *not* final, and cannot be reviewed by appeal: An order directing money to be paid into court, *Pulliam v. Christian*, 6 How. 209; *Lodge v. Twell*, 135 U. S. 232; *Louisiana Bank v. Whitney*, 121 U. S. 284; an order directing the delivery of property to a receiver, *Brown v. Swann*, 9 Pet. 1; *McCollum v. Eager*, 2 How. 61; *Thomas & Co. v. Wooldridge*, 28 Wall. 283; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429. *Contra*, *Potter v. Beal* (C. C. A.), 50 Fed. R. 860; *City of Eau Claire v. Payson* (C. C. A.), 107 Fed. R. 552. See *Re McKenzie*, 180 U. S. 536; *Tornanses v. Melsing* (C. C. A.), 106 Fed. R. 775; 31 St. at L. 660; *supra*, § 238; an order directing the delivery of property to a new trustee appointed by the court, when another matter is reserved for further consideration, *Pulliam v. Christian*, 6 How. 209; but see *Winthrop Iron Co. v. Meeker*, 109 U. S. 180; an order dissolving an injunction, *Hayes v. Fischer*, 102 U. S. 121; a decree staying proceedings till the entry of a decree of a State court or the further order of the Federal court, *Merriman v. Chicago & E. L. Co.* (C. C. A.), 64 Fed. R. 535; an order directing a sale which does not describe the property to be sold sufficiently specifically to warrant an immediate sale, *Railroad Co. v. Swasey*, 23 Wall. 405; an order directing a sale which does not appoint the time of sale, *Buckingham v. McLean*, 18 How. 150; *Parsons v. Robinson*, 122 U. S.

112; an order setting aside a final decree where the appellant has obtained leave to amend, *Fisher v. Simon* (C. C. A.), 67 Fed. R. 387; a decree upon a cross-bill which does not dispose of the original bill, *Ex parte Railroad Co.*, 95 U. S. 221; *Ayres v. Carver*, 17 How. 591; *Winters v. Ethell*, 132 U. S. 207; a decree in a partition suit which adjudges that the appellees are owners each of one-eighth of the property, and refers the matter to a master to proceed to a partition, *Green v. Fisk*, 103 U. S. 518; see also *Perkins v. Fourniquet*, 6 How. 206; *Elder v. McClaskey* (C. C. A.), 70 Fed. R. 529; a decree of affirmance which does not tax costs nor specify the sum for which it is rendered, *Wheeler v. Harris*, 18 Wall. 51; *The Lucille*, 19 Wall. 73; but see *Fowler v. Hamill*, 139 U. S. 549; *contra* of affirmance upon writ of error, *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 363; an order or decree denying relief except upon the performance of certain conditions, *Barker v. Craig*, 127 U. S. 218; *Stratton v. Dewey* (C. C. A.), 79 Fed. R. 82; unless it clearly appears that the appellant has refused to comply with the conditions, *Tuttle v. Claffin* (C. C. A.), 66 Fed. R. 7. A docket entry, "Opinion—Decree for complainants," is not a decree and so not appealable till a formal decree has been entered thereupon. *Herrick v. Cutcherson* (C. C. A.), 55 Fed. R. 6. A statement on the records of the court: "Court order October 26, 1893. Writ dismissed; prisoner remanded. Register 2 of Departments 1 to 10, page 249," is not a final judgment nor an order, and is not reviewable. *Clarke v. McDade*, 165 U. S. 168, 171.

Where, after certain property had been sold under a trust deed executed to secure three promissory



receiver,<sup>14</sup> and an order which is purely incidental to a previous final judgment or decree previously entered, such as an order after a judgment or decree for possession directing the

notes to the holder of two of the notes, an action was brought by the holder of the remaining note to set aside the sale, and for an account of the rents collected, and of the amount due upon the notes held by each, and the special term of the Supreme Court of the District of Columbia set aside the sale by an order from which an immediate appeal was taken, an order of the general term, reviewing the order below, ratifying and confirming the sale, and remanding the cause to the special term "for further proceedings," was held not to be a final order within the meaning of the statute allowing appeals from that court to the Supreme Court of the United States. *Dainese v. Kendall*, 119 U. S. 53.

No appeal can be taken from a decree setting aside one sale and ordering another, *Butterfield v. Usher*, 91 U. S. 246; except by the purchaser at the sale. *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. 655. See *infra*, § 505. But see *Grant v. Lowe* (C. C. A.), 89 Fed. R. 881. Nor from a decree setting aside an assignment and directing a reference to determine the rights of creditors. *Talley v. Curtain* (C. C. A.), 58 Fed. R. 4. Nor from an order discharging a previous order to the marshal to seize property of the defendant. *Riddle v. Hudgins* (C. C. A.), 58 Fed. R. 490. Nor from a decree directing an account to be taken of rents and proceeds of lands with an option to appellant to purchase them and leave certain other questions to be decided thereafter. *Crawford v. Points*, 13 How. 11. No appeal can be taken from a decree to take an account upon evidence and report to the court. *Beebe v. Russell*, 19 How. 283. A decree that the plaintiff

recover of the defendant the highest market value of certain bonds, to be ascertained by the court in special term, is not a final decree where the amount has not been ascertained. *Follansbee v. Ballard Pav. Co.*, 154 U. S. 651. Where a decree dismissed a bill with costs, but contained a recital declaring that the patent on which the complainant sued was valid, it was said that the defendant could not appeal from that part of the decree. *Corning v. Troy Iron & N. Factory*, 15 How. 451, 465.

The following decrees in admiralty were held *not* final, and consequently not appealable: A decree of restitution with costs and damages, when the court had taken no action on the report of the commissioners appointed to ascertain the damages before the appeal was taken. *The Palmyra*, 10 Wheat. 502. A decree on a libel *in personam*, for damages to be recovered, which appointed commissioners to ascertain the amount of the damages. *Chace v. Vasquez*, 11 Wheat. 429. A decree stating that the sum claimed by a petitioner was due from the fund in court, but that since the fund might not satisfy all claims, no order for payment would be made until further advised. *Montgomery v. Anderson*, 21 How. 386. A decree upon a libel claiming the condemnation of a schooner and cargo, which condemned the schooner, but made no mention of the cargo. *Dayton v. U. S.*, 131 U. S. lxxx.

A decree dismissing a claim for a portion of the property libeled is *final*, and an appeal will lie therefrom. *Withenbury v. U. S.*, 5 Wall. 819.

<sup>14</sup> *N. Y. Security & Tr. Co. v. Illi-*

issue of a writ of *habere facias possessionem*,<sup>15</sup> an order granting leave to file a bill of exceptions,<sup>16</sup> and an order of the lower court pending an appeal, directing a reference to ascertain whether a tenant should pay rent to the defendant or to a receiver previously appointed,<sup>17</sup> are not appealable.

Where, in pursuance of a special act of Congress, the Court of Claims reopened a case in which judgment had been rendered for the claimant, and, as a part of the original judgment, awarded him a further sum, which had been omitted by mistake, the order adjudging the additional sum was held merged in the original judgment, an appeal from which was barred by the lapse of time, and consequently not appealable.<sup>18</sup> A judgment of the Court of Claims which is purely advisory is not appealable.<sup>19</sup>

**§ 504. Value of the matter in dispute upon writs of error and appeals.**—The final judgments and decrees of the State courts are reviewed by the Supreme Court;<sup>1</sup> the final judgments and decrees of the Circuit and District Courts, except perhaps those of the District Courts in bankruptcy, are reviewed, by the Supreme Court and the Circuit Courts of Appeals;<sup>2</sup> the interlocutory orders of the Circuit and District Courts<sup>3</sup> and of the District Court of Hawaii<sup>4</sup> appointing receivers and granting or continuing injunctions, the final judgments and decrees of the Supreme Courts of the Continental Territories<sup>5</sup> and of the District Court of Hawaii,<sup>6</sup> and the judgments of the District Courts adjudging and refusing to adjudge the defendants bankrupts and granting or denying a discharge, are reviewed by the Circuit Courts of Appeals, in the respective cases of which these appellants have jurisdiction:<sup>7</sup> without regard to the amount involved. The judgments of the District

nois Transfer R. Co. (C. C. A.), 104 Fed. R. 710. *Cf.* *Mercantile Tr. Co. v. Farmers' L. & Tr. Co.* (C. C. A.) 81 Fed. R. 254; *supra*, § 243, note.

<sup>15</sup> *Callan v. May*, 2 Black, 541.

<sup>16</sup> *Honey v. Chicago, B. & Q. R. Co.* (C. C. A.), 82 Fed. R. 773.

<sup>17</sup> *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 118.

<sup>18</sup> *U. S. v. Grant*, 110 U. S. 225.

<sup>19</sup> *In re Sanborn*, 148 U. S. 222; *supra*, § 497.

§ 504. <sup>1</sup> U. S. R. S., § 709; *Buel v. Van Ness*, 8 Wheat. 312; *supra*, § 501.

<sup>2</sup> 26 St. at L. 826, 827, §§ 5, 6; *No. Pac. R. Co. v. Amato*, 144 U. S. 465; *s. c.* (C. C. A.), 49 Fed. R. 881; *The Paquete Habana*, 175 U. S. 677.

<sup>3</sup> 26 St. at L. 828, § 7; *supra*, § 238a.

<sup>4</sup> 31 St. at L. 158, § 86.

<sup>5</sup> 26 St. at L. 826, § 15.

<sup>6</sup> *Ibid.*

<sup>7</sup> 30 St. at L. 544, 553, § 25; *supra*, § 494.

Courts in bankruptcy which allow or reject a claim of five hundred dollars or over are reviewed by the Circuit Courts of Appeals.<sup>8</sup> The final judgments of the Circuit Courts of Appeals, allowing or rejecting a claim in bankruptcy, are reviewed by the Supreme Court, irrespective of the amount involved, whenever a justice of the Supreme Court certifies that in his opinion the determination of the question or questions involved in the rejection or allowance of the claim is essential to a uniform construction of the bankruptcy law throughout the United States;<sup>9</sup> and where the amount in controversy exceeds the sum of two thousand dollars and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States.<sup>10</sup> The final judgments and decrees of the Circuit Courts of Appeals in all other cases, where the decisions of these courts are not final, may be reviewed by the Supreme Court of the United States by appeal or writ of error, as the case may be, where the matter in controversy exceeds one thousand dollars besides costs.<sup>11</sup> The judgments and decrees of those courts in all other cases may be reviewed by the Supreme Court by *certiorari*, irrespective of the amount involved.<sup>12</sup> The judgments and decrees of the Supreme Courts of the Continental Territories,<sup>13</sup> of the Supreme Court and the District Court of Porto Rico,<sup>14</sup> and of the Court of Appeals of the District of Columbia,<sup>15</sup> are reviewed by the Supreme Court of the United States, in the cases of which it has otherwise jurisdiction, irrespective of the amount involved, whenever there is involved the validity of any patent or copyright, or there is drawn in question the validity of a treaty, or a statute of, or an authority exercised under, the United States;<sup>16</sup> and in other cases of which the Supreme Court has otherwise jurisdiction where the value of the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, which in the case of the Territories and Porto Rico should be ascertained by the oath of any party

<sup>8</sup> 30 St. at L. 544, 553, § 25; *supra*, § 494.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> 26 St. at L. 826, 829, § 6.

<sup>12</sup> *Ibid.*; *supra*, § 499.

<sup>13</sup> 23 St. at L. 443; *supra*, § 498.

<sup>14</sup> 31 St. at L. 85, § 35.

<sup>15</sup> 31 St. at L. 1227; D. C. Code, §§ 238, 1227; *supra*, § 498.

<sup>16</sup> *Ibid.*; *Maricopa & P. R. Co. v. Territory of Arizona*, 156 U. S. 347; *Springville City v. Thomas*, 166 U. S. 707.

or other competent witness.<sup>17</sup> All other judgments and decrees of the Court of Appeals of the District of Columbia may be reviewed by the Supreme Court of the United States by *certiorari* irrespective of the amount involved.<sup>18</sup> The judgments of the Court of Claims may be reviewed by appeal on behalf of the plaintiff, in case of a suit on a claim against the United States, where the amount in controversy exceeded three thousand dollars or his claim was forfeited to the United States for fraud, and on behalf of the United States in all cases decided adversely to them.<sup>19</sup> The judgments of the Court of Private Land Claims may be reviewed by the Supreme Court of the United States irrespective of the amount involved.<sup>20</sup>

Where the right to an appeal or writ of error depends on the value of the matter in dispute, such value must be estimable in money. Consequently, in such cases, where the matter in dispute is the right to personal liberty or the right to the custody of a child, by *habeas corpus* or otherwise,<sup>21</sup> the right to a divorce in which no alimony is sought or granted,<sup>22</sup> the right to a patent,<sup>23</sup> or a trade-mark,<sup>24</sup> or the right to prevent a discharge in bankruptcy,<sup>25</sup>—no appeal or writ of error can be maintained. The value of the matter in dispute at the time of the entry of the judgment is alone to be considered,<sup>26</sup> including interest accrued before judgment and therein included.<sup>27</sup> No

<sup>17</sup> U. S. R. S., § 702; 23 St. at L. 443; 81 St. at L. 85, § 85; *supra*, § 498.

<sup>18</sup> 31 St. at L. 1227; D. C. Code, § 234.

<sup>19</sup> U. S. R. S., § 707; 24 St. at L. 506, § 9; *supra*, § 457.

<sup>20</sup> 26 St. at L. 854, §§ 9, 14; *supra*, § 472.

<sup>21</sup> *Lee v. Lee*, 8 Pet. 44; *Pratt v. Fitzhugh*, 1 Black, 271; *Barry v. Mercein*, 5 How. 103; *Lau Ow Bew v. U. S.*, 144 U. S. 47; *Perrine v. Slack*, 164 U. S. 452; *Cross v. Burke*, 146 U. S. 82.

<sup>22</sup> *Simms v. Simms*, 175 U. S. 162, 166.

<sup>23</sup> *Durham v. Seymour*, 161 U. S. 235.

<sup>24</sup> *South Carolina v. Seymour*, 153 U. S. 853.

<sup>25</sup> *Huntington v. Saunders*, 163 U. S. 819. So held of the right to a

county seat. *Smith v. Adams*, 130 U. S. 167. A county clerk who is not shown to be a taxpayer has no pecuniary interest in the assessment of property there for taxation. *Cafrey v. Oklahoma Territory*, 177 U. S. 344, 346. See also *Cameron v. U. S.*, 146 U. S. 533.

<sup>26</sup> *Bank of U. S. v. Daniel*, 12 Peters, 82; *Walker v. U. S.*, 4 Wall. 163.

<sup>27</sup> *Quebec S. S. Co. v. Merchant*, 133 U. S. 375; *Keller v. Ashford*, 133 U. S. 610; *Mass. Ben. L. Ass'n v. Miles*, 137 U. S. 689. But not interest added by an *ex parte* amendment of the judgment on the defendant's motion. *No. Pac. R. Co. v. Booth*, 152 U. S. 671. As to the method of calculating the interest when there have been payments on account of the principal, see *Woodward v. Jew-*

interest subsequently accrued,<sup>28</sup> or right claimed at the outset of the suit but abandoned before the judgment was entered, can be taken into consideration.<sup>29</sup> Where a defendant's counter-claim has been dismissed and judgment rendered for the plaintiff, the amount of the counter-claim added to the amount of the plaintiff's recovery is the value of the matter in dispute,<sup>30</sup> unless the bill of exceptions shows that on the trial the defendant abandoned all or a part of his counter-claim.<sup>31</sup> Where the matter set up in a cross-bill is directly responsive to the averments in the original bill, and is directly connected with the transactions therein set forth as the gravamen of the plaintiff's case, the amount claimed in the cross-bill may be considered in determining the jurisdiction on appeal from a decree upon both bills.<sup>32</sup> The probative force of the judgment, and its effect as an estoppel in a subsequent suit between the same parties to

ell, 140 U. S. 247. As to the plaintiff's right to reduce the judgment by filing a *remittitur* of part of the verdict, and thus prevent an appeal, see *supra*, § 378. Where part of the judgment had been paid it was held that the balance, not the original amount, was the matter in dispute. *Thorp v. Bonnifield*, 177 U. S. 15. So where part of the amount of the judgment was not disputed below. *Wabash, St. L. & P. Ry. Co. v. Knox*, 110 U. S. 304; *Cox v. Western L. & C. Co.*, 123 U. S. 375. It has been held that the plaintiff cannot, by excepting to the allowance of part of the damages awarded to him and to the refusal by the trial court to permit a *remittitur*, when he brings a writ of error to correct this alleged error, obtain a dismissal of defendant's writ of error upon the ground that the actual value of the matter in dispute is less than the jurisdictional amount. *Balt. & O. R. Co. v. Griffith*, 159 U. S. 603. Upon appeal from a decree or writ of error to the judgment of an appellate court affirming the decree or judgment of a court below it, where such judgment or decree of affirmance expressly in-

cludes interest from a time antecedent to its entry and the interest is part of the claim litigated, the interest is included in the computation of the value of the matter in dispute. *Zeckendorf v. Johnson*, 123 U. S. 617; *The Patapsco*, 12 Wall. 451; *The Rio Grande*, 19 Wall. 178. See *Keller v. Ashford*, 138 U. S. 610, 617; *Woodward v. Jewell*, 140 U. S. 247, 248. If the judgment of affirmance is silent as to interest, interest is not included in the computation. *Railroad Co. v. Trook*, 100 U. S. 112; *District of Columbia v. Gannon*, 130 U. S. 327.

<sup>28</sup> *Walker v. U. S.*, 4 Wall. 163; *Knapp v. Banks*, 2 How. 73; *W. U. Tel. Co. v. Rogers*, 98 U. S. 565; *Thompson v. Butler*, 95 U. S. 694.

<sup>29</sup> *Tintsman v. National Bank*, 100 U. S. 6.

<sup>30</sup> *Dushane v. Benedict*, 120 U. S. 630; *Block v. Darling*, 140 U. S. 234; *Buckstaff v. Russell*, 151 U. S. 626; *Clark v. Sibway*, 142 U. S. 682; *Sire v. Ellithrope A. B. Co.*, 137 U. S. 579.

<sup>31</sup> *Bradstreet Co. v. Higgins*, 112 U. S. 227.

<sup>32</sup> *Lovell v. Cragin*, 136 U. S. 130, 141.

recover a larger amount, as in the case of a judgment in a suit to collect a coupon, cannot be considered as adding to the value of the matter in dispute.<sup>33</sup> As a general rule, where judgment is for the defendant, the amount of the plaintiff's claims is the value of the matter in dispute; but this rule is subject to the qualification that the demand shall clearly appear to have been made in good faith for such amount.<sup>34</sup> Where the object of a suit is to apply property worth more, to the payment of a debt worth less, than the jurisdictional amount, the amount of the debt, not the value of the property, is the test of jurisdiction.<sup>35</sup> In a suit to establish the right to an office, the aggregate amount of the salary for the unexpired term claimed by the plaintiff in error is the value of the matter in dispute.<sup>36</sup> In a suit to remove a trustee, the value of the matter in dispute is the value of the trust estate, not the value of the trustee's commissions or other compensation.<sup>37</sup> In a suit to recover land the value of the interest in the same claimed by the plaintiff is that of the matter in dispute.<sup>38</sup> In a suit for an injunction,

<sup>33</sup> *Elgin v. Marshall*, 106 U. S. 578, 580; *Bruce v. Manchester & K. R. Co.*, 117 U. S. 514; *Clay Center v. Farmers' L. & Tr. Co.*, 145 U. S. 224. *Cf.* *Richardson v. Green*, 180 U. S. 104.

<sup>34</sup> If, for instance, a greater amount than \$5,000 was claimed in the *ad damnum* clause of the declaration, and the bill of particulars showed the actual claim to be less, the latter would be the value of the matter in dispute. *Gorman v. Havird*, 141 U. S. 206, 207, per Brown, J. So in an action for trespass on land worth \$1,800, by the levy upon the same of an execution for less than \$30, when there was no allegation of special damage, and it appeared that the plaintiff had released the levy by paying the amount of the execution, although spite was alleged, and the damages laid at \$6,000, the court held that the matter in dispute was less than \$5,000. *Magruder v. Armes*, 180 U. S. 496. See *Bradstreet Co. v. Higgins*, 112 U. S. 227; and *supra*, § 16.

<sup>35</sup> *Gibson v. Shufeldt*, 122 U. S. 27, 29, per Gray, J.; *Peyton v. Robertson*, 9 Wheat. 527; *Farmers' Bank of Alexandria v. Hooff*, 7 Pet. 168; *Ross v. Prentiss*, 8 How. 771.

<sup>36</sup> *U. S. v. Addison*, 22 How. 174; *Smith v. Whitney*, 116 U. S. 167; *Handley v. Stutz*, 137 U. S. 366. See *N. E. Mtga. Security Co. v. Gay*, 145 U. S. 123; *U. S. v. Wanamaker*, 147 U. S. 149. A sum claimed for disbursements not alleged to have been made by the plaintiff is not included. *Gorman v. Havird*, 141 U. S. 206.

<sup>37</sup> *Kenaday v. Edwards*, 134 U. S. 117. But see *Caffrey v. Territory of Oklahoma*, 177 U. S. 346.

<sup>38</sup> *Green v. Fisk*, 154 U. S. 668; *Vicksburg, S. & P. R. Co. v. Smith*, 135 U. S. 195; *Black v. Jackson*, 177 U. S. 349; *Cameron v. U. S.*, 146 U. S. 533. In a suit to recover the possession of leasehold premises, the amount expended by the lessee in the improvement of the premises may be considered in estimating the value of the matter in dispute. *Harris v. Barber*,



the value of the object sought to be gained by the bill, not the amount of the plaintiff's damages, is ordinarily the value of the matter in dispute.<sup>39</sup>

In a suit to compel an executor to account for certain assets, the value of plaintiff's interest in such assets, not the value of the assets, is that of the matter in dispute.<sup>40</sup> Where a number of plaintiffs claiming under the same title and having a common interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them, their united interests constitute the matter in dispute.<sup>41</sup> Where a suit is brought by

129 U. S. 866. In a proceeding to recover summary possession of mortgaged property held by a tenant of the mortgagor, the value of the defendant's leasehold, not that of the land, was held to be that of the matter in dispute. *Willis v. Eastern Tr. & B. Co.*, 167 U. S. 76. Where the plaintiff sought to review a judgment giving it possession of land upon the payment of money which was awarded to the defendant, the latter sum, not the value of the land, was the value of the matter in dispute. *Pittsburg L. & C. Works v. State Nat. Bank*, 154 U. S. 626. In a suit of trespass *quare clausum fregit* and *de bonis asportatis*, the amount of the judgment for the value of ore taken from the land was the value of the matter in dispute, not the value of the land, where neither party set up title, although the judgment might collaterally affect the title. *N. J. Zinc Co. v. Trotter*, 108 U. S. 564.

<sup>39</sup> *Miss. & Mo. R. Co. v. Ward*, 2 Black, 485; *Market Co. v. Hoffman*, 101 U. S. 112. In a suit to enjoin the issue of municipal bonds, the jurisdictional amount is not the amount of the whole issue sought to be enjoined, but the amount of taxes which the complainant would be compelled to pay for interest and a sinking fund. *El Paso Water Co. v.*

*El Paso*, 152 U. S. 157; *Colvin v. Jacksonville*, 158 U. S. 456. *Cf.* *Elliott v. Sackett*, 108 U. S. 132. In a suit to enjoin an association of railway companies from enforcing a joint agreement in violation of the interstate commerce law, allegations that the daily interstate shipments thereunder exceeded in value \$1,000, and that free competition would cause great losses and possibly financial ruin to the defendants, were held to be sufficient to show that the value of the matter in dispute exceeded \$1,000. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290. But see *El Paso Water Co. v. El Paso*, 152 U. S. 157.

<sup>40</sup> *Miller v. Clark*, 188 U. S. 223. So held of a suit by a judgment creditor to set aside an insolvent assignment and for an accounting. *Hollander v. Fechheimer*, 162 U. S. 326.

<sup>41</sup> *Gibson v. Shufeldt*, 122 U. S. 27, 30, per Gray, J.; *Estes v. Gunter*, 121 U. S. 183; *Shields v. Thomas*, 17 How. 8; *Market Co. v. Hoffman*, 101 U. S. 112; *Davies v. Corbin*, 112 U. S. 36; *Friend v. Wise*, 111 U. S. 797. So held of an action to recover damages for causing death where the damages were divided among several next of kin. *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 352. So held of a judgment against several defendants jointly for the possession of several

one for himself and all others jointly interested, the aggregate interest of those who join with him, not that of the whole class, constitutes the disputed matter.<sup>42</sup> Where several persons join in one suit to assert separate and distinct interests, and these interests alone are in dispute, their interests upon appeal are considered separately, and the amount of the interest of each is the limit of the appellate jurisdiction, even when they sue in behalf of themselves and all others similarly interested.<sup>43</sup> Where different claimants obtain a decree in their favor for sums to be paid separately to each of them, the largest amount thus decreed is the value of the matter in dispute.<sup>44</sup> Where one person obtained a decree for the payment of two sums of money to him by the same persons, one to be retained by him for his own benefit, the other to be held by him as trustee for others, the aggregate of the two sums was held to be the value of the matter in dispute.<sup>45</sup> When there is an appeal of which the court has jurisdiction and which opens the whole case, a cross-appeal which involves less than the jurisdictional amount

parcels of land. *Friend v. Wise*, 111 U. S. 797. But see *Chamberlain v. Browning*, 177 U. S. 605.

<sup>42</sup> *Bruce v. Manchester & K. R. Co.*, 117 U. S. 514, 516; *Handley v. Stutz*, 188 U. S. 866. But see *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223.

<sup>43</sup> *Gibson v. Shufeldt*, 123 U. S. 27, 34, per Gray, J.; *Seaver v. Bigelows*, 5 Wall. 208; *Russell v. Stansell*, 105 U. S. 308; *Chatfield v. Boyle*, 105 U. S. 231; *Adams v. Crittenden*, 106 U. S. 576; *Schwed v. Smith*, 106 U. S. 188; *F. L. & Tr. Co. v. Waterman*, 106 U. S. 265; *Hassall v. Wilcox*, 115 U. S. 598; *Fourth Nat. Bank v. Stout*, 118 U. S. 684; *Stewart v. Dunham*, 115 U. S. 61; *Paving Co. v. Mulford*, 100 U. S. 147; *Ex parte Phoenix Ins. Co.*, 117 U. S. 867; *Wheeler v. Cloyd*, 134 U. S. 537; *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223; *Smith M. P. Co. v. McGroarty*, 186 U. S. 237; *Clay v. Field*, 188 U. S. 464, 479, 480, per Mr. Justice Brad-

ley: "The general principle observed in all cases is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

<sup>44</sup> *Ex parte Baltimore & O. R. Co.*, 106 U. S. 5; *The Nevada*, 106 U. S. 154.

<sup>45</sup> *The Propeller Burlington*, 137 U. S. 386, 390. See *Hawley v. U. S.*, 108 U. S. 543.

may also be taken and decided.<sup>46</sup> Where the value of the matter in dispute does not appear upon the record, affidavits upon this point may be filed either in the inferior court or in the supreme appellate court.<sup>47</sup> When filed in the inferior court they must be sent with the record.<sup>48</sup> The burden of proof is upon the plaintiff in error or appellant.<sup>49</sup> A finding or a statement upon the subject in an order of the court below is given great weight,<sup>50</sup> but is not conclusive.

**§ 505. Parties to writs of error and appeals.**—All parties on the record who are injuriously affected by a final judgment or decree may appeal or sue out a writ of error. An intervenor has the right of appeal from a final decree, judgment, or order by which he is injuriously affected.<sup>1</sup> A purchaser at a foreclosure sale has a right to appeal from an order by which he is injuriously affected.<sup>2</sup> The cases in which a receiver can

<sup>46</sup> *Walsh v. Meyer*, 111 U. S. 81; *U. S. v. Mosby*, 133 U. S. 273.

<sup>47</sup> *Wilson v. Blair*, 119 U. S. 887; *Street v. Ferry*, 119 U. S. 885; *Gibson v. Shufeldt*, 122 U. S. 27.

<sup>48</sup> *Wilson v. Blair*, 119 U. S. 887; *Davie v. Heyward*, 88 Fed. R. 93; *Rector v. Lipscomb*, 141 U. S. 557.

<sup>49</sup> *Johnson v. Wilkins*, 116 U. S. 392; *Wilson v. Blair*, 119 U. S. 887.

<sup>50</sup> *Gage v. Pumpelly*, 108 U. S. 164; *Potts v. Hollon*, 177 U. S. 365; *Red River Cattle Co. v. Needham*, 137 U. S. 632. It seems that where such a finding or order was made upon conflicting affidavits below, new affidavits cannot be filed in the Supreme Court. *Ibid.* *Cf.* *Moelle v. Sherwood*, 148 U. S. 21.

§ 505. <sup>1</sup> *Ex parte Jordan*, 94 U. S. 248; *Krippendorf v. Hyde*, 110 U. S. 276; *Williams v. Morgan*, 111 U. S. 684; *Hassall v. Wilcox*, 115 U. S. 508; *Savannah v. Jesup*, 106 U. S. 563; *Tuttle v. Clafin* (C. C. A.), 88 Fed. R. 122. The right to appeal from an order denying the right to intervene is discussed *supra*, § 201a; *Ex parte Cutting*, 94 U. S. 14; *Buel v. Farmers' L. & Tr. Co.* (C. C. A.), 104 Fed. R. 839. A State which has re-

fused to intervene in, or to become a party to, a suit affecting property in which it claims an interest cannot appeal. *Georgia v. Jesup*, 106 U. S. 458; *South Carolina v. Wesley*, 155 U. S. 542.

<sup>2</sup> He can appeal from an order refusing to confirm the sale or setting it aside. *Magann v. Segal* (C. C. A.), 92 Fed. R. 252. See *Davis v. Mercantile Tr. Co.*, 152 U. S. 590. Thus, when not concluded by the terms of the sale, or of the order or decree under which the sale was made, he may appeal from a subsequent final order or decree which determines in what securities, if of diverse value, his bid shall be made good, *Kneeland v. Am. L. & Tr. Co.*, 136 U. S. 89, 95; or the amount of compensation for trustees or others, *Williams v. Morgan*, 111 U. S. 684; or the validity and amount of claims by intervenors or others, which he has agreed to pay before the amount was adjusted. *Kneeland v. Am. L. & Tr. Co.*, 136 U. S. 89, 95; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 505. He should be made a party to an appeal from an order affecting his bid or denying a motion to set

appeal have been hereinbefore described.<sup>3</sup> A party to a suit may appeal from a final order or decree by which his application to compel a receiver to account for or pay over money to him has been denied; and the receiver is a proper party respondent to such an appeal.<sup>4</sup> It seems that a purchaser of the rights of a party injuriously affected may take an appeal.<sup>5</sup> Persons who have contributed to the expense of a defense, although not parties, were allowed to appeal in the name of the nominal defendants without the formal consent of the latter when the decree had weight as a precedent against them.<sup>6</sup> The United States can appeal from a decision of the Court of Private Land Claims although it has no pecuniary interest in the result of the litigation.<sup>7</sup> Where an alien had been discharged from extradition by the writ of *habeas corpus*, the consul of the government that sought the extradition was allowed to take an appeal.<sup>8</sup> Otherwise no one but a party to the record has the right to an appeal or a writ of error.<sup>9</sup> And a party cannot appeal from a decree or judgment which does not injuriously affect him.<sup>10</sup> A plaintiff may sue out a writ of error to reverse a judgment in his favor.<sup>11</sup> An appeal or writ of error

aside the sale. *Davis v. Mercantile Tr. Co.*, 152 U. S. 590. A purchaser cannot appeal from a decree establishing the validity of receivers' certificates, or other claims, which he has agreed to pay without reserving the right to contest their validity. *Swann v. Wright's Ex'r*, 110 U. S. 590. A Circuit Court of Appeals refused to take judicial notice of the fact that an appellant who called himself a "purchasing trustee" had bought the property when the transcript did not show it. *Fitzgerald v. Evans* (C. C. A.), 49 Fed. R. 426; *supra*, § 264.

<sup>3</sup> *Supra*, § 249. See *Rust v. United Waterworks Co.* (C. C. A.), 70 Fed. R. 129.

<sup>4</sup> *Hovey v. McDonald*, 109 U. S. 150, 155.

<sup>5</sup> *Andrews v. Ill. Nat. Foundry & P. Works* (C. C. A.), 76 Fed. R. 166; *s. c.* (C. C. A.), 77 Fed. R. 774. As to a substituted receiver's rights, see *Bowden v. Johnson*, 107 U. S. 251.

<sup>6</sup> *Andrews v. Thum* (C. C. A.), 64 Fed. R. 149; *s. c.* (C. C. A.), 67 Fed. R. 91. *Cf.* *Hunt v. Oliver*, 109 U. S. 177.

<sup>7</sup> *U. S. v. De La Paz Valdez de Conway*, 175 U. S. 60; *supra*, § 472.

<sup>8</sup> *Ornelas v. Ruiz*, 161 U. S. 502, 507.

<sup>9</sup> *Bayard v. Lombard*, 9 How. 530; *Payne v. Niles*, 20 How. 219; *Ex parte Cockcroft*, 104 U. S. 578; *Guion v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 173; *Indiana S. R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 168; *Georgia v. Jesup*, 106 U. S. 458; *South Carolina v. Wesley*, 155 U. S. 542.

<sup>10</sup> *Crawshay v. Soutter*, 6 Wall. 789; *Brigham City v. Toltec Ranch Co.* (C. C. A.), 101 Fed. R. 85; *Tyler v. Judges of the Court of Registration*, 179 U. S. 405; *Lampasas v. Bell*, 180 U. S. 276; *New Orleans v. Einsheimer*, 181 U. S. 153.

<sup>11</sup> *U. S. v. Dashiell*, 3 Wall. 688.

cannot be maintained in the name of a vessel; it must be in the name of a person interested in the vessel.<sup>12</sup> The friends of a party who is imprisoned cannot sue out a writ of error in his name without his authority;<sup>13</sup> but an appeal from an order upon a writ of *habeas corpus* remanding a prisoner who is charged with lunacy may be taken by his next friend.<sup>14</sup> An appeal taken by a district attorney without the authority of the Attorney-General will be sustained, if subsequently ratified by the Attorney-General.<sup>15</sup>

All parties against whom a joint judgment or joint decree is entered must join in the writ of error or appeal, unless one or more, when asked, refuse so to do, and such request and refusal appear upon the record.<sup>16</sup> There are two reasons for this: that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; and that the appellate tribunal shall not be required to decide a second or third time the same question on the same record.<sup>17</sup> The formal practice on a writ of error in such a case is for the party who wishes the benefit of the writ to obtain a summons, bringing the party jointly interested with him before the court, and if the latter then refuses to join in the writ of error, to enter an order or judgment of severance, whereby the moving party can sue out the writ alone.<sup>18</sup> Thereupon the party who refuses to join is estopped from taking out a writ of error, and the court

<sup>12</sup> *The Burns*, 9 Wall. 237.

<sup>13</sup> *Ex parte Dorr*, 8 How. 103.

<sup>14</sup> *King v. McLean Asylum of Massachusetts General Hospital* (C. C. A.), 64 Fed. R. 325.

<sup>15</sup> *U. S. v. Curry*, 6 How. 106.

<sup>16</sup> *Masterson v. Herndon*, 10 Wall. 416; *O'Dowd v. Russell*, 14 Wall. 402; *Williams v. Bank of U. S.*, 11 Wheat. 414; *Owings v. Kincannon*, 7 Pet. 399; *Heirs of Wilson v. Life & Fire Ins. Co.*, 12 Pet. 140; *Hardee v. Wilson*, 146 U. S. 179; *Inglehart v. Stanbury*, 151 U. S. 68; *Sipperley v. Smith*, 155 U. S. 86; *Beardsley v. Arkansas L. Ry. Co.*, 158 U. S. 123; *Estis v. Trabue*, 128 U. S. 225; *Feibelman v. Packard*, 108 U. S. 14; *Hohorst v. Hamburg Am. P. Co.*, 148 U. S. 262;

*Nash v. Harshman*, 149 U. S. 263; *St. Louis Un. El. Co. v. Nichols* (C. C. A.), 91 Fed. R. 832; *Dodson v. Fletcher* (C. C. A.), 78 Fed. R. 214; *s. c.* (C. C. A.), 79 Fed. R. 129; *Hook v. Mercantile Tr. Co.* (C. C. A.), 95 Fed. R. 41; *Grand Id. & W. C. R. Co. v. Sweeney* (C. C. A.), 95 Fed. R. 396; *Humes v. Third Nat. Bank* (C. C. A.), 54 Fed. R. 917; *Hedges v. Seibert C. O. C. Co.* (C. C. A.), 50 Fed. R. 643; *Loveless v. Ransom* (C. C. A.), 107 Fed. R. 626; *Johnson v. Trust Co. of America* (C. C. A.), 104 Fed. R. 174; *Ayres v. Polsdorfer* (C. C. A.), 105 Fed. R. 737. But see *Cox v. U. S.*, 6 Pet. 172.

<sup>17</sup> *Masterson v. Herndon*, 10 Wall. 416.

<sup>18</sup> 2 Brooke's Abr. 238, tit. Summons

below can execute the judgment so far as it can be executed against him, despite a *supersedeas* obtained by the other.<sup>19</sup> Now, however, such a technical proceeding is no longer necessary; and when the record shows that one of the parties jointly affected has been notified in writing to appear and join in the appeal or writ of error, and has failed to appear, or appeared and refused to join, the court should on that ground grant an appeal or writ as to his own interest to the party who seeks it.<sup>20</sup> A statement in the petition for the appeal, that the other party jointly affected refuses to join in the appeal, is insufficient.<sup>21</sup> Where the record shows that there are other parties to the judgment jointly interested with the plaintiff in error, who have not joined in the writ of error, and who have not been served with notice of the proceedings in error, the appellate court may of its own motion dismiss the writ without giving leave to bring them in by an amendment;<sup>22</sup> although it seems that in an extraordinary case leave so to amend may be given after the time to sue out a new writ of error has expired.<sup>23</sup> But where the time to appeal for one of those jointly interested had expired, it was held that the others could not appeal without him.<sup>24</sup> A defendant whose interest is separate from that of the others may appeal or bring error without them.<sup>25</sup>

and Severance; *Todd v. Daniel*, 16 Pet. 521; *Masterson v. Herndon*, 10 Wall. 416, 417, 418; *Hardee v. Wilson*, 146 U. S. 179, 181.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Masterson v. Herndon*, 10 Wall. 416; *O'Dowd v. Russell*, 14 Wall. 402; *Hardee v. Wilson*, 146 U. S. 178, 180; *Farmers' L. & Tr. Co. v. McClure* (C. C. A.), 78 Fed. R. 211.

<sup>21</sup> *Masterson v. Herndon*, 10 Wall. 416; *Hardee v. Wilson*, 146 U. S. 179, 180.

<sup>22</sup> *Estis v. Trabue*, 128 U. S. 225; *Mason v. U. S.*, 136 U. S. 581; *Dolan v. Jennings*, 139 U. S. 385. The appellate court will not presume that there are parties not named in the record, although some of the defendants in error are described as "*Corning & Co.*" *Gumbel v. Pitkin*, 113

U. S. 545. The objection may be raised at any time. *Loveless v. Ransom* (C. C. A.), 107 Fed. R. 626. But see *Central L. & Tr. Co. v. Campbell Com. Co.*, 173 U. S. 84.

<sup>23</sup> *Inland & Seaboard C. Co. v. Tolson*, 136 U. S. 572. But see *Estis v. Trabue*, 128 U. S. 225, 230.

<sup>24</sup> *Ayres v. Polsdorfer* (C. C. A.), 105 Fed. R. 787.

<sup>25</sup> *Brewster v. Wakefield*, 22 How. 118; *Cox v. U. S.*, 6 Pet. 172; *Forgay v. Conrad*, 6 How. 201; *Germain v. Mason*, 12 Wall. 259; *Hanrick v. Patrick*, 119 U. S. 156; *City Nat. Bank v. Hunter*, 129 U. S. 557; *Gilfillan v. McKee*, 159 U. S. 303; *Gray v. Havemeyer* (C. C. A.), 53 Fed. R. 174; *Hall v. Gambrill* (C. C. A.), 92 Fed. R. 82; *Mercantile Tr. Co. v. Kanawha & O. Ry. Co.* (C. C. A.), 58 Fed. R. 6;



All parties to the suit, including intervenors, who would be injuriously affected by a reversal of a decree must be made respondents to an appeal therefrom;<sup>26</sup> even, it seems, when they have not appeared after service upon them.<sup>27</sup> But not parties below who have no interest in maintaining or reversing the decree.<sup>28</sup> Where the basis of an appeal is that a necessary party was not joined below, such omitted party should be

*Grand Id. & W. C. R. Co. v. Sweeney* (C. C. A.), 103 Fed. R. 842; *Louisville, N. A. & C. Ry. Co. v. Pope* (C. C. A.), 74 Fed. R. 1. Where judgment in an action of trespass was rendered against one defendant by default, and against the other upon a plea, it was held that the latter could bring a writ of error alone. *Macker v. Thomas*, 7 Wheat. 530. Trustees of a railroad mortgage, who have been joined with the railroad company as defendants to a bondholder's foreclosure suit in which they have no personal interest, need not be joined with the railroad company on an appeal. *Railroad Co. v. Johnson*, 15 Wall. 8. See also *Marchand v. Livandais*, 127 U. S. 775. Parties who have acquired liens subsequent to a mortgage need not join in an appeal from a decree of foreclosure. *Brewster v. Wakefield*, 22 How. 118. An insolvent railroad company need not join in an appeal from so much of a decree as distributes the proceeds of a foreclosure sale. *Hardee v. Wilson*, 146 U. S. 179; *Galveston, H. & N. Ry. Co. v. House* (C. C. A.), 102 Fed. R. 112.

<sup>26</sup> *Wilson v. Kiesel*, 164 U. S. 248; *St. Louis Un. El. Co. v. Nichols* (C. C. A.), 91 Fed. R. 832; *Boyle v. Stuttgart & A. R. R.* (C. C. A.), 84 Fed. R. 9; *Illinois Tr. & Sav. Bank v. Kilbourne* (C. C. A.), 76 Fed. R. 883; *Kidder v. Fidelity I. & D. Co.* (C. C. A.), 105 Fed. R. 821. Thus the mortgagor, mortgagee and purchaser must be made respondents to an appeal from a decree of foreclosure and sale, or

from an order refusing to modify or set aside a decree. *Davis v. Mercantile Trust Co.*, 152 U. S. 590; *Farmers' L. & Tr. Co. v. Longworth* (C. C. A.), 76 Fed. R. 609. In a foreclosure suit to which the holders of several mechanics' liens are parties defendant, the decree settling their respective rights to priority is not joint as respects them, and one of them may appeal without joining the others as appellants; but if he claims the right to have the decree modified so as to give him a priority which was denied him below, he must make parties respondent those whose liens he seeks to have made subordinate to his. *Gray v. Havemeyer* (C. C. A.), 53 Fed. R. 174; *Grand Id. & W. C. R. Co. v. Sweeney* (C. C. A.), 103 Fed. R. 842.

<sup>27</sup> *Am. L. & Tr. Co. v. Clark* (C. C. A.), 83 Fed. R. 280. But see *Marsh v. Nichols*, 120 U. S. 598.

<sup>28</sup> *Basket v. Hassell*, 107 U. S. 602; *McLeod v. New Albany* (C. C. A.), 66 Fed. R. 378; *Postal Tel. & C. Co. v. Vane* (C. C. A.), 80 Fed. R. 961; *Mills v. Provident L. & Tr. Co.* (C. C. A.), 100 Fed. R. 344; *Marchand v. Livandais*, 127 U. S. 775. Where in an action of trespass brought to try the title to real estate, third persons intervened, setting up a claim of title derived through the plaintiffs, and a judgment in the plaintiffs' favor was entered against the defendants and the intervenors, it was held that the intervenors need not be made parties to the writ of error. *Hanrick v. Patrick*, 119 U. S. 156.

served with a citation.<sup>29</sup> A receiver should be made a party to an appeal from an order or decree refusing to direct the payment of a claim out of a fund in his hands.<sup>30</sup> It has been held that the holders of receiver's certificates are sufficiently represented by the receiver upon an appeal by a creditor from a decree distributing the proceeds upon them.<sup>31</sup> The great number of parties interested is no reason for omitting any of them, since service of a citation need not be made where the appeal is taken in open court at the same term.<sup>32</sup> It has been said that no one not a party to the judgment below can be a defendant to the writ of error.<sup>33</sup> An appeal by one of several defendants brings up so much of the case and such of the parties as are necessary for the determination of his rights.<sup>34</sup>

Whenever any party to a judgment or decree in a Circuit Court dies before the time allowed for taking an appeal or bringing a writ of error has expired, it is not necessary to revive the suit by any formal proceeding.<sup>35</sup> It was formerly held, that when an executor had been removed after a decree against him, and an administrator *de bonis non* with the will annexed appointed, the administrator must be made a party to the suit before he could appeal.<sup>36</sup> If one of several plaintiffs or defendants dies before or after an appeal is taken, and the cause of action survives to the rest, the survivors have the right to proceed alone, unless the representative of the deceased applies to join with them.<sup>37</sup> The representative of the deceased party may file in the clerk's office a certified copy of his appointment, and thereupon may enter an appeal or bring writ

<sup>29</sup> *R. R. Equipment Co. v. So. Ry. Co.* (C. C. A.), 92 Fed. R. 541. See *Co. (C. C. A.), 105 Fed. R. 821; infra, § 508.*

*Mendenhall v. Hall*, 134 U. S. 559.

<sup>30</sup> *Illinois Tr. & Sav. Bank v. Kilbourne* (C. C. A.), 76 Fed. R. 883. But not receivers who have been discharged. *St. Louis S. W. Ry. Co. v. Jackson* (C. C. A.), 95 Fed. R. 560. Nor when the fund is held by the clerk of the court and paid on orders signed by the judge. *Edgell v. Felder* (C. C. A.), 99 Fed. R. 324.

<sup>31</sup> *Galveston, H. & N. Ry. Co. v. House* (C. C. A.), 102 Fed. R. 112.

<sup>32</sup> *Kidder v. Fidelity L. Tr. & S. D.*

<sup>33</sup> *Payne v. Niles*, 20 How. 219.

<sup>34</sup> *Milner v. Meek*, 95 U. S. 252.

<sup>35</sup> Act of March 3, 1875, ch. 137, § 9, 18 St. at L. 473.

<sup>36</sup> *Taylor v. Savage*, 1 How. 282; s. c., 2 How. 395. But see an analogous case where a receiver had been removed, which seems inconsistent with this ruling. *Burden v. Johnson*, 107 U. S. 251.

<sup>37</sup> *Moses v. Wooster*, 115 U. S. 285; U. S. R. S., § 156. But see *Dolan v. Jennings*, 139 U. S. 385.

of error, as the deceased party might have done.<sup>38</sup> Where the party in whose favor such a judgment or decree is taken dies before appeal taken or writ of error brought, the statute provides that notice to his representatives shall be given from the appellate court, as provided in case of the death of a party after appeal taken or writ of error brought.<sup>39</sup> It has been held

<sup>38</sup> 18 St. at L. 473.

<sup>39</sup> 18 St. at L. 473. The rule of the Supreme Court to which reference is made is as follows: "XV. 1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous; *provided, however*, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing. 2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within

that time to compel their appearance, the case shall abate. 3. When either party to a suit in a Circuit Court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the Circuit Court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative,

that where an appellee has died pending an appeal to the Supreme Court, the administrator of his domicile may be substituted in his place, although he was appointed in a different State from that where the suit was brought below;<sup>40</sup> and that a person who purchased the interest of the appellee during his life and pending an appeal cannot after his death revive the appeal in his own name.<sup>41</sup> When the time to appeal or bring error has expired it is too late to bring in the representatives of a party who died before the appeal was taken or the writ of error sued out.<sup>42</sup> Where notwithstanding the survival of the cause of action or liability to co-appellants, the representatives of the deceased appellant voluntarily come in and ask to be made parties, they may be admitted.<sup>43</sup> Where the presence of the representatives of a deceased appellant is necessary for the due prosecution of an appeal, notwithstanding the survivorship of others, the appellate court may direct that the appeal be dismissed unless such representatives are made parties within a limited time.<sup>44</sup>

**§ 506. Time within which writs of error and appeals must be taken.**—No judgment, decree, or order of a Circuit or Dis-

and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed, if the same be erroneous; *provided, however*, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; *and provided, also*, that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding such suggestion, and the measures above

provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; *and provided, also*, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases."

<sup>40</sup> Noonan v. Bradley, 12 Wall. 121.

<sup>41</sup> Barribeau v. Brant, 17 How. 43.

<sup>42</sup> Dolan v. Jennings, 139 U. S. 885; Mason v. U. S., 136 U. S. 581; Estis v. Trabue, 128 U. S. 225. But see Knickerbocker L. Ins. Co. v. Pendleton, 115 U. S. 339.

<sup>43</sup> Thorpe v. Mattingley, 1 Phillips' Ch. 200.

<sup>44</sup> Blake v. Bogle, Macq. Pr. of H. of L. 244, note; Moses v. Wooster, 115 U. S. 285, 288.

strict Court except in a suit upon a claim against the United States, or of a State Court,<sup>1</sup> or of the Supreme Court of the District of Columbia,<sup>2</sup> or of the Supreme Court of a Territory,<sup>3</sup> or of the Supreme Court or the District Court of Porto Rico,<sup>4</sup> in any action at law or in equity, can be reviewed by the Supreme Court, unless the writ of error is brought or the appeal taken within two years after the entry of such judgment, decree, or order; but where a party entitled to prosecute a writ of error or take an appeal is an infant, insane, or imprisoned, such writ of error may be prosecuted, or such appeal taken, within two years after the judgment, decree, or order, exclusive of the term of such disability.<sup>5</sup> Where the imprisonment or other disability has not begun till after the statute has begun to run, the operation of the statute is not suspended pending such disability.<sup>6</sup> No appeal from a writ of error to a judgment or decree of a Circuit or District Court in a suit upon a claim against the United States is allowed on behalf of the plaintiff after ninety days from the entry of the same,<sup>7</sup> and on behalf of the United States after six months therefrom.<sup>8</sup> "Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court below previously extends the time for cause shown in the particular case: *Provided*, that the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the District Court within thirty days next after the rendition of the final decree therein."<sup>9</sup> "All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered."<sup>10</sup>

Appeals from the judgments of the Court of Private Land Claims must be taken by the claimant within six months from the date of the decision, and by the United States within the same period of time, unless the attorney of the United States fails to give the Attorney-General, within sixty days after the

§ 506. <sup>1</sup> U. S. R. S., § 1008; *Allen v. So. Pac. R. Co.*, 173 U. S. 479; *Holt v. Indiana Mfg. Co.*, 176 U. S. 68.

<sup>2</sup> U. S. R. S., § 705.

<sup>3</sup> U. S. R. S., § 702.

<sup>4</sup> 31 St. at L. 85, § 85.

<sup>5</sup> *McDonald v. Hovey*, 110 U. S. 619.

<sup>6</sup> U. S. R. S., § 708; 26 St. at L. 505, § 9; *U. S. v. Davis*, 131 U. S. 86, 89.

<sup>7</sup> *Ibid.*, § 10.

<sup>8</sup> U. S. R. S., § 1009; *The Nuestra Senora De Regia*, 17 Wall. 29.

<sup>9</sup> U. S. R. S., § 708. But see U. S.

*v. Davis*, 131 U. S. 86, 89.

rendition of the judgment, a written notice of the same with a clear statement of the case and the points decided by the court, verified by a certificate of the presiding justice thereof, in which case the right of appeal of the United States continues to exist until six months next after the receipt of such statement.<sup>10</sup> No appeal can be taken or writ of error sued out to review a decision of a Circuit Court of Appeals unless within one year after the entry of the order, judgment, or decree sought to be reviewed.<sup>11</sup> It seems that the same limitation applies to applications to review such decisions by *certiorari*.<sup>12</sup> Appeals to the Supreme Court of the United States from the United States courts in the Indian Territory must be perfected within sixty days from final judgment.<sup>13</sup> No writ of error from the Supreme Court to review a conviction of crime the punishment of which is death can be "sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record."<sup>14</sup>

"No appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed; *provided, however*, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals."<sup>15</sup> An appeal from an interlocutory order or decree granting or continuing an injunction, or appointing a receiver, must be taken within thirty days from the entry of such order or decree.<sup>16</sup> An appeal from a decision of a Circuit Court re-

<sup>10</sup> 26 St. at L. 854, 858, § 9; U. S. v. Pena, 175 U. S. 500.

<sup>11</sup> 26 St. at L. 828, § 6.

<sup>12</sup> The Conqueror, 166 U. S. 110. Cf. Panama R. Co. v. Napier Shipping Co., 166 U. S. 280.

<sup>13</sup> 30 St. at L. 591.

<sup>14</sup> 25 St. at L. 658, § 6.

<sup>15</sup> 26 St. at L. 829, § 11; Union Pac. Ry. Co. v. Colorado E. Ry. Co. (C. C. A.), 54 Fed. R. 22; White v. Iowa Nat. Bank (C. C. A.), 71 Fed. R. 91; Condon v. Central L. & Tr. Co. (C. C. A.), 78 Fed. R. 907; Coe v. East & Ir. R. Co. of Ala. (C. C. A.), 85 Fed. R. 489.

<sup>16</sup> 26 St. at L. 828, § 7; 31 St. at L.



viewing a decision of the Board of General Appraisers must be taken within thirty days from the decision of the court.<sup>17</sup> Appeals to the Circuit Courts of Appeals and the Supreme Courts of the Territories from judgments of the courts of bankruptcy adjudging or refusing to adjudge the defendant a bankrupt, or allowing or rejecting a debt or claim, must be taken within ten days after the judgment appealed from has been rendered.<sup>18</sup> It seems that petitions for a revision of the orders of the courts of bankruptcy must be filed within six months from the making of such orders.<sup>19</sup>

These limitations do not apply to writs of error *coram nobis*.<sup>20</sup> The State statutes as to the time of taking appeals and suing out writs of error do not affect the jurisdiction of the Federal courts.<sup>21</sup> The time does not begin to run till the judgment, decree, or order is actually entered or filed, and, when the judge's signature is required, not till it is signed,<sup>22</sup> although it

660. This rule applies to a decree after a hearing for an injunction and an accounting. *Raymond v. Royal B. S. Co.* (C. C. A.), 76 Fed. R. 465.

<sup>17</sup> 26 St. at L. 138, § 15. This limitation does not apply to an appeal by the United States from an order denying a petition to modify a judgment upon a *remittitur* as regards interest and costs. *Marine v. Lyon* (C. C. A.), 62 Fed. R. 153.

<sup>18</sup> 30 St. at L. 544, 553, § 2. In other cases in bankruptcy six months is allowed. *Steele v. Buel* (C. C. A.), 104 Fed. R. 968; *supra*, § 494.

<sup>19</sup> *In re Worcester County* (C. C. A.), 102 Fed. R. 808; *supra*, § 494. But see *In re Anderson*, 23 Fed. R. 482.

<sup>20</sup> *Strode v. The Stafford Justices*, 1 Brock. 162. See *supra*, § 379.

<sup>21</sup> *Logan v. Goodwin* (C. C. A.), 101 Fed. R. 654; *s. c.* (C. C. A.), 104 Fed. R. 490.

<sup>22</sup> *Rubber Co. v. Goodyear*, 6 Wall. 153; *Del Valle v. Harrison*, 93 U. S. 233; *Polleys v. Black River Imp. Co.*, 113 U. S. 81; *Radford v. Folsom*, 123 U. S. 725. When a decree is entered dismissing a bill with costs, the time to appeal begins to run, although a

judgment for costs is subsequently entered. *Fowler v. Hamill*, 139 U. S. 549. When one defendant had demurred and obtained a decree dismissing the bill as to him, and the other defendant had answered, and subsequently obtained a decree dismissing the bill, an appeal taken within two years after the second, but more than two years after the first decree, was held to be in time to bring up both decrees for review. *Mendenhall v. Hall*, 134 U. S. 559. The time of an intervenor to appeal does not begin to run until he is allowed to intervene. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501. Where a decree dismissed a bill as to all matters except one which was severable from the rest, as to which a subsequent decree was entered, it was held that the right to appeal from the first dismissal began to run from the entry of the first decree. *Hill v. Chicago & E. R. Co.*, 140 U. S. 52. See also *Central Tr. Co. v. Grant L. Works*, 135 U. S. 207; *Richardson v. Green*, 130 U. S. 104. The right to appeal from a decree dismissing a cross-bill does not ordina-

is dated as of a prior day.<sup>23</sup> A decision containing directions for a decree is not considered as a decree.<sup>24</sup> When the order of judgment or decree is amended, it seems that the time begins to run anew from the date of the amendment.<sup>25</sup> If a petition for a rehearing is duly filed or a motion for a new trial duly made, or a motion to set aside the judgment made during the term, the time does not begin to run until the petition or motion has been denied;<sup>26</sup> and an appeal allowed before the petition or motion is made, but not perfected till afterwards, is considered as not pending till it is perfected.<sup>27</sup> The appellate court, if the record does not show when the petition for a rehearing, which has been denied, was filed, will presume that it was filed in time.<sup>28</sup> The day on which the order, judgment, or decree was entered is excluded from the computation of the time.<sup>29</sup> It has been held that when the last day of the limited time falls on a Sunday, the writ or appeal cannot be taken on a subsequent day.<sup>30</sup>

The time to appeal or to sue out a writ of error cannot be extended by the court by an order permitting it to be filed *nunc pro tunc* or otherwise;<sup>31</sup> and it has been held that respondents or defendants in error cannot waive the objection that the time has expired.<sup>32</sup> An appeal cannot be taken from a decree or order before the decision is pronounced.<sup>33</sup>

ally exist, nor the time begin to run until the entry of a final decree disposing of the whole matter in litigation. *Winters v. Ethell*, 132 U. S. 207. Cross-appeals may be taken and allowed below after an appeal has been taken and the cause removed to the appellate court, provided the original time to appeal has not expired. *Farrar v. Churchill*, 135 U. S. 609.

<sup>23</sup> *Rubber Co. v. Goodyear*, 6 Wall. 153. But see *Credit Co. v. Arkansas Cent. Ry. Co.* 128 U. S. 258.

<sup>24</sup> *U. S. v. Gomez*, 1 Wall. 690. Cf. *Marks v. No. Pac. R. Co.* (C. C. A.), 76 Fed. R. 941. But see *Silsby v. Foote*, 20 How. 290; *Fairbanks v. Amoskeag Nat. Bank*, 32 Fed. R. 572.

<sup>25</sup> *U. S. v. Gomez*, 1 Wall. 690. But see *U. S. v. Grant*, 110 U. S. 225.

<sup>26</sup> *Texas & Pac. Ry. Co. v. Murphy*,

111 U. S. 488; *Brockett v. Brockett*, 2 How. 238; *Memphis v. Brown*, 94 U. S. 715; *Aspen M. S. S. Co. v. Billings*, 150 U. S. 81; *Alexander v. U. S.*, 57 Fed. R. 828. For a case where a rehearing was allowed in order to allow an appeal after the time had expired, see *In re Wright*, 96 Fed. R. 820.

<sup>27</sup> *Vorhees v. John T. Noye Co.*, 151 U. S. 135.

<sup>28</sup> *Texas & Pac. Ry. Co. v. Murphy*, 111 U. S. 488.

<sup>29</sup> *Smith v. Gale*, 137 U. S. 577.

<sup>30</sup> *Johnson v. Meyers* (C. C. A.), 54 Fed. R. 417.

<sup>31</sup> *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258; *Judson v. Courier Co.*, 25 Fed. R. 705. But see *In re Wright*, 96 Fed. R. 820.

<sup>32</sup> *Stevens v. Clark* (C. C. A.), 62 Fed. R. 821.

<sup>33</sup> *Brown v. Evans*, 18 Fed. R. 56.

The writ of error is not brought till it is filed in the office of the clerk of the court to which it is addressed.<sup>34</sup> So, when it is tested, allowed and issued within the time, but not filed till afterwards, it is brought too late.<sup>35</sup> An appeal is taken when it is allowed, and its allowance is brought to the attention of the court below either by filing in the clerk's office the petition and the allowance of the appeal; or, where there is no formal allowance thereof, when the bond or appeal is approved and filed, either with or without the citation.<sup>36</sup> The fact that the bond is filed<sup>37</sup> or the citation not issued till after the statutory time does not cut off the right to appeal if the petition and its allowance were duly filed.<sup>38</sup> It has been held that, where the record or the bond shows that a formal appeal was allowed, the filing of the bond with its approval within the time is insufficient;<sup>39</sup> but that where there was no formal appeal the filing of the bond with its approval is sufficient.<sup>40</sup>

§ 507. Writs of error.—A writ of error issues from the clerk's office of the appellate court, to which it is returned. A writ of error to review the judgment of a Circuit Court may issue from the clerk's office of that Circuit Court, returnable to the Supreme Court or Circuit Court of Appeals, as the case may be.<sup>1</sup> The writ issues in the name of the President of the United States,<sup>2</sup> is tested of the date of issue<sup>3</sup> in the name of the Chief Justice of the United States, or, when that office is

As to the right of appeal after the announcement of a decision, but before the entry of an order or decree thereupon, see *Fairbanks v. Amoskeag Nat. Bank*, 32 Fed. R. 572; *Credit Co. v. Arkansas C. Ry. Co.*, 128 U. S. 258; *Ex parte Whitton*, 134 U. S. 881.

<sup>34</sup> *Brooks v. Norris*, 11 How. 204; *Scarborough v. Pargoud*, 108 U. S. 567; *U. S. v. Baxter (C. C. A.)*, 51 Fed. R. 624. The failure of the clerk to mark it filed makes no difference when it is left in his office. *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 327, 336.

<sup>35</sup> *Brooks v. Norris*, 11 How. 204; *Mussina v. Cavazos*, 6 Wall. 355, 360; *Scarborough v. Pargoud*, 108 U. S. 567; *U. S. v. Baxter*, 51 Fed. R. 624.

<sup>36</sup> *The Dos Hermanos*, 10 Wheat. 806;

*Brandies v. Cochrane*, 105 U. S. 262; *Credit Co., Ltd., v. Arkansas C. Ry. Co.*, 128 U. S. 258, 261.

<sup>37</sup> *The Dos Hermanos*, 10 Wheat. 806.

<sup>38</sup> *Evans v. State Bank*, 134 U. S. 330.

<sup>39</sup> *Norcross v. Nave & McCord Mfg. Co. (C. C. A.)*, 101 Fed. R. 796. See *Credit Co. v. Arkansas Cent. R. Co.*, 128 U. S. 258.

<sup>40</sup> *Brandies v. Cochrane*, 105 U. S. 262.

§ 507. <sup>1</sup> U. S. R. S., § 1004; 26 St. at L., ch. 517, §§ 2, 11, pp. 826, 829; *No. Pac. R. Co. v. Amato (C. C. A.)*, 49 Fed. R. 881.

<sup>2</sup> S. C. Rule 5.

<sup>3</sup> U. S. R. S., § 912; *Atherton v. Fowler*, 91 U. S. 148.

vacant, in the name of the associate justice next in precedence,<sup>4</sup>—that is, with the oldest commission,<sup>5</sup>—and bears the seal of the court whose clerk issues it, and is signed by such clerk.<sup>6</sup> The writ is directed to the court whose proceedings it is intended to review, and directs such court to send up under its seal to the appellate court the record and process for inspection. The return-day of a writ of error or appeal must be not more than thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time;<sup>7</sup> except in case of writs of error or appeals from the Supreme Court to review the decisions of the Circuit and District Courts of California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, and Idaho,<sup>8</sup> when the return-day must be not more than sixty days from the day of signing the citation.<sup>9</sup> The writ is a writ of the court of review, although issued from the clerk's office of the Circuit Court.<sup>10</sup> A writ of error must set out the names of all the parties, plaintiff and defendant in error.<sup>11</sup>

It is the better practice to include in the writ of error a description of the position of the parties as plaintiffs and defend-

<sup>4</sup> U. S. R. S., § 911; *Germain v. Mason*, 154 U. S. 587; *infra*, § 24.

<sup>5</sup> U. S. R. S., § 674.

<sup>6</sup> U. S. R. S., §§ 911, 1004; *Miller v. Texas*, 153 U. S. 535.

<sup>7</sup> S. C. Rule 8; C. C. A. Rule 14. As to the place of the return in the Ninth Circuit, see *McFadden v. Mountain V. & M. M. Co. (C. C. A.)*, 97 Fed. R. 670. A writ of error will not be dismissed because no return-day is named when it is by its terms returnable within thirty days, although the order allowing it made it returnable in sixty days. *Texas & P. R. Co. v. Bloom (C. C. A.)*, 60 Fed. R. 979. The writ will not be dismissed because returned a few days after the return-day. *Altenberg v. Grant (C. C. A.)*, 83 Fed. R. 980. See *infra*, § 512.

<sup>8</sup> S. C. Rule 9.

<sup>9</sup> S. C. Rule 8.

<sup>10</sup> *Mussina v. Cavazos*, 6 Wall. 355.

<sup>11</sup> *Smyth v. Strader*, 12 How. 327; *Davenport v. Fletcher*, 16 How. 142. A writ is insufficient which names but one of the plaintiffs or defendants in error, and describes the rest on the same side as "and others," *De Neale v. Archer*, 8 Pet. 526; *Miller v. McKenzie*, 10 Wall. 582; or which describes parties by their firm name instead of their individual names, *The Protector*, 11 Wall. 82; *Moore v. Simonds*, 100 U. S. 145; *Godbe v. Tootle*, 154 U. S. 576; unless the record shows the partners' names, *Estis v. Trabue*, 128 U. S. 225; or as "the heirs of Nicholas Wilson," *Wilson v. Life & Fire Ins. Co.*, 12 Pet. 140; or as "the ship *Protector* and owners," *The Protector*, 11 Wall. 82. An appeal by "William L. Hemingway, Treasurer of the State of Mississippi, and Sylvester Gwinn,

ants below, as well as of their positions in the court of review; but if the latter statement is made, the omission of the former will not avoid the writ.<sup>12</sup> Where the writ of error contains the names of all the parties who appear on the record, the court of review cannot presume that there are other parties, and for that reason dismiss the writ.<sup>13</sup> Where the writ of error omitted parties named in the citation, the court dismissed the writ.<sup>14</sup>

A mistake in the date will not vitiate a writ of error which is duly issued and served.<sup>15</sup> A writ of error to a State court need not contain a recital that it is directed to the final judgment of such court, nor that the court is the highest court of law or equity in the State.<sup>16</sup>

The appellate court may, at any time, in its discretion and with or without terms, allow an amendment of a writ of error, when there is a mistake in the teste, or a seal is wanting, or the writ is made returnable on a wrong day, or when the statement of the title or the parties is defective, if such defect can be remedied by reference to the accompanying record, and in all other particulars of form, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error.<sup>17</sup> A high authority — Judge Curtis — has said of the statute authorizing such amendments: "It is difficult to see, in reading it, what defect cannot now be amended in the discretion of the court."<sup>18</sup> It is the practice to file a petition for the

Auditor of said State, and *ex officio* the Levee Board of Mississippi District Number One," was held sufficient to bring up for review a decree against the Levee Board, although a statute had been passed, entitled "An act to abolish the Levee Board of District Number One, and to pay the debts of said Board," which abolished the offices of the members of such board, and substituted the officers who took the appeal in their place to settle up the unfinished business and pay the debts of the board. *Hemingway v. Stansell*, 106 U. S. 399.

<sup>12</sup> *Mussina v. Cavazos*, 6 Wall. 355, 361.

<sup>13</sup> *Gumbel v. Pitkin*, 118 U. S. 545.

<sup>14</sup> *Kail v. Wetmore*, 6 Wall. 451.

<sup>15</sup> *O'Dowd v. Russell*, 14 Wall. 402.

<sup>16</sup> *Buell v. Van Ness*, 8 Wheat. 312.

<sup>17</sup> U. S. R. S., § 1005; *Cotter v. Ala. G. S. R. Co. (C. C. A.)*, 61 Fed. R. 747.

<sup>18</sup> *Curtis, Jurisdiction of U. S. Courts*, 87. A writ of error which does not name any return-day may be amended by the insertion of a return-day. *Evans v. Brown*, 109 U. S. 180. But where there was no application for an amendment the writ was dismissed. *Lea v. Conn. Mut. L. L. Co.*, 154 U. S. 650. Where the writ was in the name of the President of the United States, but bore the teste of the Chief Justice of the State court, with his signature and that of the clerk of such court, and the seal of such court, an amendment of the

writ, and to have it allowed by a judge of the court to which it is addressed, or a judge of the court of review.<sup>19</sup> The petition should be accompanied with an assignment of errors, which should set out separately and particularly each error asserted and intended to be urged. No writ of error to a Circuit or District Court is allowed till such an assignment of errors is filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors should quote the full substance of the evidence. When the error alleged is

writ was allowed. *Texas & Pac. Ry. Co. v. Kirk*, 111 U. S. 486. Where the paper purporting to be a writ of error was in the name and bore the teste of the Chief Justice of a State court, and was signed by the clerk and sealed with the seal of such court, it was held that there was no writ to amend, and that consequently the defect could not be cured. *Bondurant v. Watson*, 103 U. S. 278. The writ may be amended even after argument to bring in new parties, but in that case a reargument will be ordered. *Knickerbocker Life Ins. Co. v. Pendleton*, 115 U. S. 339. A substitution of a plaintiff in error was made where the person substituted sued out the writ in the name of the original plaintiff in error, each claiming to be the personal representative of a decedent. *Walton v. Marietta Chair Co.*, 157 U. S. 842. Where the original writ of error had been destroyed before the return-day, without the fault of the plaintiff in error, the court allowed a copy to be returned. *Musina v. Cavazos*, 6 Wall. 355.

<sup>19</sup> This is required by statute in the case of writs of error of State courts. *Twitchell v. Commonwealth*, 7 Wall. 321; *Spies v. Illinois*, 123 U. S. 181, 148; *N. W. Mut. Union Packet Co. v. Home Ins. Co.*, 154 U. S. 588; *supra*, § 500. Before the Evarts Act of March 8, 1891, it was not required for writs of error to

the Circuit and District Courts, *Davidson v. Lanier*, 4 Wall. 447; *Ex parte Virginia Com'rs*, 112 U. S. 177; except to review convictions of capital crimes. 25 St. at L. 656, § 6. S. C. Rules 85 and 86, and C. C. A. Rule 11, seem now to require the allowance of the writ in all cases. *Tuskaloosa No. Ry. Co. v. Gude*, 141 U. S. 244. It is the better practice for the judge to indorse his allowance upon both the petition and the writ; but his indorsement on either is sufficient. Where the judge's indorsement of his allowance by mistake is wrongly dated the clerk has no power to correct the date, but it is not improper for him to add a memorandum stating the facts. *Warner v. Texas & P. Ry. Co. (C. C. A.)*, 54 Fed. R. 920. The signature of a citation and the approval of a bill of exceptions were held to be equivalent to the allowance of a writ of error. *Louisville Tr. Co. v. Stockton*, (C. C. A.), 72 Fed. R. 1. But see *Tuskaloosa No. Ry. Co. v. Gude*, 141 U. S. 244. It is no defect in a writ of error that the petition prayed for an appeal. *Wilmington v. Ricaud (C. C. A.)*, 90 Fed. R. 212. The petition need not mention each order and judgment complained of. That is the function of the assignments of error. So held under C. C. A. Rule 11 of the Seventh Circuit. *Tefft v. Stern (C. C. A.)*, 74 Fed. R. 755.



to the charge of the court, the assignment of errors should set out the part referred to in the words of the charge, whether it be in instructions given or instructions refused. When the error alleged is to the ruling upon the report of a master, the specification should state the exception to the report and action of the court upon it.<sup>20</sup> There should be annexed to and returned with every writ of error, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.<sup>21</sup> "When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard except at the request of the court, and errors not specified according to this rule will

<sup>20</sup> U. S. R. S., § 997; S. C. Rule 85; C. C. A. Rule 14, 24. It has been held that assignments of errors filed after the writ of error or appeal was allowed will be disregarded. *U. S. v. Goodrich*, 54 Fed. R. 21; *Union Pac. Ry. Co. v. Colorado Eastern Ry. Co.* (C. C. A.), 54 Fed. R. 22. Even when filed within additional time granted by the court when the appeal was allowed. *Mutual Life Ins. Co. v. Conoley* (C. C. A.), 63 Fed. R. 180. Where an assignment of error included objections to several distinct instructions of the court it was disregarded, although separate exceptions were taken to each instruction. *Atchison, T. & S. F. R. Co. v. Mulligan* (C. C. A.), 67 Fed. R. 569. An assignment of error to a charge will not be considered unless duly taken at the trial. *Tinsman v. F. R. Patch Mfg. Co.* (C. C. A.), 101 Fed. R. 873. Upon appeal from an order granting an interlocutory injunction it was held sufficient simply to state that the court erred in granting the injunction. *Doan v. Am. Book Co.* (C. C. A.), 105 Fed. R. 772. It was held that an assignment of error in the language of the finding claimed to be erroneous was sufficiently specific. *Ibid.* Where an injunction was modified it was held that the assignment of errors

must include the order as modified. *Williams v. Mitchell* (C. C. A.), 106 Fed. R. 168. As to the form of the assignments of error, see *Chapin v. Fye*, 179 U. S. 127; *Columbus Const. Co. v. Crane Co.* (C. C. A.), 101 Fed. R. 55; *Farnsworth v. Nevada Co.* (C. C. A.), 102 Fed. R. 578; *No. Chicago St. Ry. Co. v. Burnham* (C. C. A.), 102 Fed. R. 669; *Burt v. C. Gotzian & Co.* (C. C. A.), 102 Fed. R. 937; *Deering Harvester Co. v. Kelly* (C. C. A.), 103 Fed. R. 261; *Adams v. Shirk* (C. C. A.), 104 Fed. R. 54; *Hale v. Tyler*, 104 Fed. R. 757; *Cass County v. Gibson* (C. C. A.), 107 Fed. R. 863; *Hutchinson Cooperage Co. v. Snider* (C. C. A.), 107 Fed. R. 633; *infra*, § 514. As to the practice upon appeals from the taxation of costs, see *Campbell Pr. P. & Mfg. Co. v. Duplex Pr. P. Co.* (C. C. A.), 101 Fed. R. 282.

<sup>21</sup> U. S. R. S., § 997. See *infra*, §§ 511, 514. A prayer that the writ may issue "for the correction of errors so complained of" is sufficient. *Springfield S. D. & Tr. Co. v. Attica* (C. C. A.), 85 Fed. R. 387. The failure to attach the writ of error to the transcript is not a fatal defect, but the attachment may be made in the court of review. *Cotter v. Ala. G. S. R. Co.* (C. C. A.), 61 Fed. R. 747.

be disregarded, but the court, at its option, may notice a plain error not assigned.”<sup>22</sup>

A writ of error is served by lodging a copy with the clerk of the court to which it is directed.<sup>23</sup> It must be served before its return-day.<sup>24</sup> A citation should be addressed to the defendants in error,<sup>25</sup> and signed by a judge of the court to which the writ is addressed, or any justice or judge of the appellate court,<sup>26</sup> and must be served upon them before the return-day;<sup>27</sup> but, when the writ has been duly issued and returned, the appellate court may allow an *alias* citation to be issued and served subsequently upon some of the defendants in error.<sup>28</sup> Service by mail is insufficient unless the objection is waived.<sup>29</sup> Service of the citation may be made upon the attorney of the defendants in error in the suit below,<sup>30</sup> even though he has been paid his fee and discharged from all further duty.<sup>31</sup> Service made on the partner<sup>32</sup> or executrix of the attorney of record is insufficient.<sup>33</sup> Service on one of two joint parties is sufficient, even if the other is dead.<sup>34</sup> In a State where the common law as regards the relations of husband and wife was unchanged, service on

<sup>22</sup> S. C. Rule 21; C. C. A. Rule 24; Clinton E. Warden Co. v. California F. S. Co. (C. C. A.), 102 Fed. R. 334.

<sup>23</sup> Davidson v. Lanier, 4 Wall. 447.

<sup>24</sup> Wood v. Lide, 4 Cranch, 180; Pickett v. Legerwood, 7 Pet. 144. A writ will not be dismissed because the citation was served less than thirty days before the return-day. Seagrist v. Crabtree, 127 U. S. 772. Cf. Mendenhall v. Hall, 134 U. S. 559. See Ex parte Parker, 120 U. S. 737. But see U. S. R. S., § 799; Tripp v. Santa Rosa St. R. Co., 144 U. S. 126.

<sup>25</sup> Peale v. Phipps, 8 How. 256; Bigler v. Waller, 12 Wall. 142.

<sup>26</sup> Sage v. Railroad Co., 96 U. S. 712; Richards v. Mackall, 113 U. S. 539. It may be signed by a different judge from the one who approved the bond. Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co. (C. C. A.), 73 Fed. R. 314. The signature of the clerk is insufficient. Brown v. McConnell, 124 U. S. 489; Freeman v. Clay (C. C. A.), 48 Fed. R. 849.

<sup>27</sup> See S. C. Rule 8; U. S. R. S., §§ 997, 999; National Bank v. Bank of Commerce, 99 U. S. 608.

<sup>28</sup> Altenberg v. Grant (C. C. A.), 83 Fed. R. 980; Knickerbocker L. I. Co. v. Pendleton, 115 U. S. 339.

<sup>29</sup> Tripp v. Santa Rosa St. Ry. Co., 144 U. S. 126.

<sup>30</sup> Bacon v. Hart, 1 Black, 38; Bigler v. Waller, 12 Wall. 142. An amendment showing his relation to the defendant in error may be subsequently allowed. McClellan v. Pyeatt (C. C. A.), 49 Fed. R. 259. Where an attorney appeared on the record as representing several respondents, it was held that his admission as solicitor for some of them bound them all. Ibid.

<sup>31</sup> U. S. v. Curry, 6 How. 106.

<sup>32</sup> Railroad Co. v. Blair, 100 U. S. 661.

<sup>33</sup> Bacon v. Hart, 1 Black, 38.

<sup>34</sup> Waters v. Barrill, 131 U. S. lxxxiv.

the husband of a woman who had married since the judgment was held sufficient.<sup>35</sup> Upon a writ of error to a judgment in favor of the Treasurer of a State, the citation must be served on the Treasurer, not on the Governor and the Attorney-General of such State.<sup>36</sup> Where the defendant in error has since the judgment moved into another State or district, it seems that an order for service upon him by publication, or by the marshal of the district where he is found, may be granted.<sup>37</sup> The object of service of a citation is notice; and where sufficient notice has been given by a stipulation and motion,<sup>38</sup> or by an order of the appellate court served upon the appellee, directing him to appear and argue the cause,<sup>39</sup> a citation is unnecessary. A failure to serve the citation before the writ of error is returnable is a ground for dismissing the case.<sup>40</sup> A general appearance in the Supreme Court for a term without moving to dismiss is a waiver of service of the citation,<sup>41</sup> or of a defect in the names of the defendants in error or respondents<sup>42</sup> or in the return-day,<sup>43</sup> but not a waiver of a motion to dismiss the case upon another ground which is not a mere informality, except the lapse of time.<sup>44</sup> An indorsement by the counsel for the defendant in error on a bond given as security for the costs on the writ of error is a waiver of service of a citation.<sup>45</sup> Notice in open court of a writ of error given at the term when the judgment is rendered is not equivalent to a citation.<sup>46</sup> Under the old practice it was held that no mandamus would issue to compel the allowance of a writ of error by a Circuit or District Court.<sup>47</sup> No mandamus will issue to compel a judge of a Circuit or District Court to sign a citation or approve security in error or on

<sup>35</sup> *Fairfax v. Fairfax*, 5 Cranch, 19.

<sup>36</sup> *Poydras de La Laude v. Treas. of Louisiana*, 17 How. 1.

<sup>37</sup> *Nations v. Johnson*, 24 How. 195; *Renaud v. Abbott*, 116 U. S. 277. Service by mail is insufficient. *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 128.

<sup>38</sup> *U. S. v. Gomez*, 1 Wall. 690.

<sup>39</sup> *Dodge v. Knowles*, 114 U. S. 430.

<sup>40</sup> *Hewitt v. Filbert*, 116 U. S. 142; *Radford v. Folsom*, 123 U. S. 725. See *infra*, § 512.

<sup>41</sup> *U. S. v. Armejo*, 131 U. S. App.

lxxxii; *Pierce v. Cox*, 9 Wall. 786;

*Buckingham v. McLean*, 13 How. 150; *Radford v. Folsom*, 123 U. S. 725.

<sup>42</sup> *U. S. v. Hopewell* (C. C. A.), 51 Fed. R. 798.

<sup>43</sup> *Shute v. Keyser*, 149 U. S. 649.

<sup>44</sup> *Goodwin v. Fox*, 120 U. S. 775; *infra*, § 512.

<sup>45</sup> *Pierce v. Cox*, 9 Wall. 786.

<sup>46</sup> *U. S. v. Phillips*, 121 U. S. 254. As to appeals, see *infra*, § 508.

<sup>47</sup> *Ex parte Virginia Com'rs*, 112 U. S. 177.

appeal, until an application for such signature or approval has been made to the judges of the court of review.<sup>48</sup>

§ 508. Appeals.—An appeal must be allowed by a judge who has power to sign a citation, namely, by a judge of the court appealed from or of the appellate court.<sup>1</sup> An approval of a bond on appeal is equivalent to the allowance of an appeal.<sup>2</sup> A bond is not essential to the validity of an appeal, although a bond must subsequently be filed.<sup>3</sup> A mandamus will be granted to compel a judge to allow an appeal in a proper case.<sup>4</sup> The allowance of an appeal is not conclusive, and does not even imply that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it.<sup>5</sup> An order allowing an appeal has relation back to the date

<sup>48</sup> Ibid.

§ 508. <sup>1</sup> *Barrel v. Transp. Co.*, 8 Wall. 424; *Pierce v. Cox*, 9 Wall. 786; *Sage v. Railroad Co.*, 96 U. S. 712; *supra*, § 507. It has been held that a district judge cannot allow an appeal to the Circuit Court of Appeals from the order of another district judge in another district of the same circuit. *U. S. v. Moy Yee Tai* (C. C. A.), 109 Fed. R. 1. It has been said that he cannot allow an appeal from a District or Circuit Court in another district. Ibid. Appeals from the Court of Private Land Claims may be allowed by any judge of that court. *U. S. v. Pena*, 175 U. S. 500. Appeals from the Court of Claims must be allowed by the court if in session; in vacation by the chief justice of that court. The limitation of time for granting such an appeal ceases to run from the time an application is made for its allowance. App. Ct. Cl., Rule 3. The Court of Claims has power to revoke an order allowing an appeal at the request of the appellant, while the record remains therein at the term when the order was granted. *Ex parte Roberts*, 15 Wall. 884. It has been said that a Circuit or District Court has no power after an appeal has been perfected and the

transcript filed to set aside an allowance of an appeal. *Keyser v. Farr*, 105 U. S. 265; *Rector v. Lipscomb*, 141 U. S. 557. But a Circuit Court was allowed, at the term when it allowed an appeal to the Supreme Court, which had not been perfected, to set aside such allowance and grant an appeal to the Circuit Court of Appeals. *Aspen Min. Co. v. Billings*, 150 U. S. 31, 35. And a Circuit Court, when the allowance was made under a mistake of fact, revoked the same. *Farmers' L. & Tr. Co. v. McClure* (C. C. A.), 78 Fed. R. 211. An omission of the names of the appellees from the order of allowance is waived by naming them in the appeal bond. *Richardson v. Green*, 130 U. S. 104.

<sup>2</sup> *Railroad Co. v. Bradleys*, 7 Wall. 575; *Sage v. Railroad Co.*, 96 U. S. 712; *Brandies v. Cochrane*, 105 U. S. 262. Not, however, when the time to appeal has previously elapsed. *Killian v. Clark*, 111 U. S. 784.

<sup>3</sup> *Edmonson v. Bloomshire*, 7 Wall. 306, 311.

<sup>4</sup> *U. S. v. Adams*, 6 Wall. 101; *U. S. v. Gomez*, 8 Wall. 752; *Ex parte Railroad Co.*, 95 U. S. 221.

<sup>5</sup> *Taney, C. J.*, in *Callan v. May*, 2 Black, 541, 543. Ordinarily a judge has no right to refuse to allow an

of the application therefor, and is considered as made on that day.<sup>6</sup>

Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary.<sup>7</sup> Where the appeal is allowed at the term of the decree or judgment, but not perfected until after the term, a citation is necessary to bring in the parties;<sup>8</sup> but if the appeal be docketed at the next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exist for lack of docketing, a citation may be issued by leave of the appellate court, although the time for taking the appeal has elapsed.<sup>9</sup> Where the appeal is allowed at a term subsequent to that of the decree or judgment, a citation

appeal for which application is duly made. *Pullman's P. C. Co. v. Central Transp. Co.*, 71 Fed. R. 809. It has been said that where there is some uncertainty as to the appealability of an order, as one denying an application for leave to intervene, it is the duty of the judge of the court of first instance to allow the appeal. *U. S. v. Phillips* (C. C. A.), 17 Fed. R. 824. But, upon a denial of an application for the writ of *habeas corpus*, when all the questions raised had been decided by the Supreme Court, an appeal was not allowed. *In re Durrant*, 84 Fed. R. 317. An appeal by an importer from an order of a Circuit Court, on the review of the decision of the Board of General Appraisers, is only allowed when the judge who decided the question or the Circuit Court shall be of the opinion that the question involved is of sufficient importance to require a review of such decision by the appellate court, and consequently allows such appeal. An appeal on the part of the United States must be allowed, whenever the Attorney-General applies for it within thirty days after the rendition of such decision. On such an appeal, security for damages and costs must be given as in the case of other appeals in

cases to which the United States is a party. 26 St. at L. 138, § 15.

<sup>6</sup> *Latham's Appeal*, 9 Wall. 145. Where an appeal was allowed on the filing of a bond "with security to be approved by the court," it was held that the appeal was perfected when the bond with its approval was filed. *Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co.* (C. C. A.), 78 Fed. R. 814. Where, after the allowance of the appeal, a motion for a rehearing was made and subsequently the bond was approved and filed, it was held that the appeal was not pending till the bond was filed. An appeal is not taken until the petition and the order for its allowance, and bond, or some one of these papers, is filed in the court below. *Brandies v. Cochrane*, 105 U. S. 262; *Credit Co. Ld. v. Arkansas C. Ry. Co.*, 128 U. S. 258, 261.

<sup>7</sup> *Reily v. Lamar*, 2 Cranch, 344; *Brockett v. Brockett*, 2 How. 238; *Jacobs v. George*, 150 U. S. 415, 416. In such a case an entry of the allowance of the appeal should be made in the minutes, *Vasant v. Gaslight Co.*, 99 U. S. 218; or recited in the decree. *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286.

<sup>8</sup> *Jacobs v. George*, 150 U. S. 415.

<sup>9</sup> *Ibid.*

is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before.<sup>10</sup> But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of the appellate court, and not waived, the appeal becomes inoperative.<sup>11</sup>

Cross-appeals are taken and prosecuted in the same manner as other appeals;<sup>12</sup> but are heard at the same time as the original appeal.<sup>13</sup> There is some doubt as to the right and the extent of a cross-appeal from an interlocutory order or decree granting an injunction or appointing a receiver.<sup>14</sup> When the term at which an appeal was returnable has passed without the filing of the record, a second appeal may be allowed if the original time to appeal has not expired.<sup>15</sup> Otherwise, appeals are subject to the same rules, regulations, and restrictions as are prescribed in cases of writs of error.<sup>16</sup> The entry of the appeal in the clerk's office is analogous to the issue of a writ of error.<sup>17</sup>

§ 509. Security on writ of error or appeal.—The Revised Statutes provide that every judge or justice signing a citation or any writ of error or appeal shall, except in cases brought up by the United States or by direction of any department of the government, in which case none is required, take good and suf-

<sup>10</sup> Ibid. When the appeal is taken in open court at a term subsequent to that at which the decree was entered, or when the bond is not approved till a subsequent term, the service of a citation is necessary, although the attorney of the appellee was then present in court on other business. *Castro v. U. S.*, 3 Wall. 46; *Sage v. Railroad Co.*, 96 U. S. 712.

<sup>11</sup> *Jacobs v. George*, 150 U. S. 415, 416.

<sup>12</sup> *Farrar v. Churchill*, 135 U. S. 610; *Building & L. Ass'n of Dakota v. Logan*, 66 Fed. R. 827, 828.

<sup>13</sup> S. C. Rule 22; C. C. A. Rule 75.

<sup>14</sup> *Marden v. Campbell Pr. P. & Mfg. Co.* (C. C. A.), 67 Fed. R. 809.

<sup>15</sup> *Evans v. State Bank*, 134 U. S. 330.

<sup>16</sup> U. S. R. S., § 1012; *supra*, § 507. It has been held that upon an appeal

taken by the district attorney in the name of the collector, the record may be amended so as to show that the appeal was taken by the application of the Attorney-General and by substituting for the original signature to the petition for appeal and the assignment of errors the signature of the Attorney-General. "When any question is made as to the allowance of such an amendment, the usual and proper practice is to remand the case to the Circuit Court to deal with that question. But when, as in this case, the parties agree to the amendment and to the facts which justify and require it, the amendment may be made in the appellate court." *U. S. v. Hopewell* (C. C. A.), 51 Fed. R. 798, 800, per Gray, J.

<sup>17</sup> *Villabolas v. U. S.*, 6 How. 81.



ficient security that the plaintiff in error shall prosecute his writ or appeal to effect, and if he fail to make his plea good shall answer all costs.<sup>1</sup> This provision is merely directory, and an omission to take a bond does not avoid the writ of error or appeal;<sup>2</sup> but on a motion to dismiss the case on that ground an opportunity to file a bond will be allowed the plaintiff in error,<sup>3</sup> or appellant,<sup>4</sup> even after his time to appeal or sue out a new writ of error has expired; except in the case of gross laches.<sup>5</sup> But an appeal is not perfected until the bond is approved and filed.<sup>6</sup> The plaintiff in error may be allowed to file his bond *nunc pro tunc*.<sup>7</sup> The judge cannot delegate the approval of the bond to the clerk,<sup>8</sup> nor to a commissioner.<sup>9</sup> The judge may approve the bond out of court.<sup>10</sup> All the appellants or plaintiffs in error need not join in the bond.<sup>11</sup> A corporation will not be accepted as a surety when there is doubt as to its power under its charter so to act.<sup>12</sup> The bond must, however, be payable to the defendants in error or appellees.<sup>13</sup> If the sole payee

§ 509. <sup>1</sup> U. S. R. S. §§ 1000, 1012. Trustees in bankruptcy are excepted. 30 St. at L. 544, 554, § 25. Where, before the signature of the citation, another judge has approved the bond, the signature of the citation is equivalent to a new approval thereof. *Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co.* (C. C. A.), 73 Fed. R. 314. The bond is not defective for failing to specify the term at which the decree appealed from was rendered. *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506. The bond rendered will be for the whole amount of the judgment unless a *supersedeas* is asked for. *Wheeling Br. & T. R. Co. v. Cochran* (C. C. A.), 68 Fed. R. 141; *infra*, § 510.

<sup>2</sup> *Martin v. Hunter*, 1 Wheat. 304; *Davidson v. Lanier*, 4 Wall. 447; *Seymour v. Freer*, 5 Wall. 822; *Edmonson v. Bloomshire*, 7 Wall. 306, 311.

<sup>3</sup> *Davidson v. Lanier*, 4 Wall. 447; *Seymour v. Freer*, 5 Wall. 822; *Edmonson v. Bloomshire*, 7 Wall. 306, 311; *Stewart v. Masterson*, 124 U. S. 493; *Schenck v. Diamond Match Co.* (C. C. A.), 73 Fed. R. 22.

<sup>4</sup> *Wickelman v. A. B. Dick Co.* (C. C. A.), 85 Fed. R. 851; *Walker v. Houghteling* (C. C. A.), 104 Fed. R. 513.

<sup>5</sup> *Beardsley v. Arkansas & L. Ry. Co.*, 158 U. S. 123.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Shepherd v. Pepper*, 133 U. S. 626, 644.

<sup>8</sup> *O'Reilly v. Edrington*, 96 U. S. 724; *National Bank v. Omaha*, 96 U. S. 737; *Freeman v. Clay* (C. C. A.), 48 Fed. R. 849. In such a case, leave to file a new bond will usually be given. *Chicago Dollar Directory Co. v. Chicago D. Co.* (C. C. A.), 65 Fed. R. 463.

<sup>9</sup> *Haskins v. St. Louis & S. E. Ry. Co.*, 109 U. S. 106.

<sup>10</sup> *Hudgins v. Hemp*, 18 How. 530.

<sup>11</sup> *Brockett v. Brockett*, 2 How. 238. The bond is not defective because the court refused to entertain a motion for the withdrawal of its approval to a surety after a month's delay. *National Harrow Co. v. Hench*, 81 Fed. R. 1005.

<sup>12</sup> *Black v. Black*, 53 Fed. R. 985.

<sup>13</sup> *Bigler v. Waller*, 12 Wall. 142; *Swan v. Hill*, 155 U. S. 394. An omis-

is a person not a defendant in error or appellee, the appeal will be dismissed.<sup>14</sup> Where the proceeding is in the name of a State at the relation of an individual, the bond may be payable in the alternative to either the State or the relator, and either may enforce it.<sup>15</sup> No security is required upon a writ of error to the judgment of conviction of a crime in a court of the United States.<sup>16</sup> No bond is required on a writ of error or appeal by direction of the Comptroller of the Currency in a suit against a receiver of a national bank.<sup>17</sup>

An error in the names of the parties,<sup>18</sup> or an omission of some who should be obligees,<sup>19</sup> or an error in the description of the decree,<sup>20</sup> in an appeal or *supersedeas* bond, may be cured by an amendment. In a proper case a party may be allowed to take an appeal or to sue out a writ of error *in forma pauperis* without a bond;<sup>21</sup> but it has been held that leave to do this by a party unable to pay the fees or to give the bond is not a matter of course,<sup>22</sup> and may be denied when his assignment of errors is clearly frivolous.<sup>23</sup>

§ 510. *Supersedeas*.—A *supersedeas* is a stay of proceedings upon a judgment or decree to which a writ of error is issued or from which an appeal is taken.<sup>1</sup> To secure a *supersedeas* in a civil case, the writ of error or appeal, and the security required to be given upon the issue of a citation, must be lodged in the clerk's office for the use of the defendant in

sion in this respect may be cured by amendment in the appellate court. *Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co.* (C. C. A.), 73 Fed. R. 814. A writ is not defective because other parties are also joined as obligees. *Hill v. Chicago & E. Ry. Co.*, 129 U. S. 170.

<sup>14</sup> *Davenport v. Fletcher*, 16 How. 142.

<sup>15</sup> *Spalding v. People*, 2 How. 66.

<sup>16</sup> 25 St. at L., ch. 113, § 6, p. 656; *In re Claasen*, 140 U. S. 200, 208. See 20 St. at L., ch. 176, § 2, p. 354.

<sup>17</sup> *Pacific Bank v. Mixter*, 114 U. S. 463; *Robinson v. Southern Bank*, 94 Fed. R. 22. A bond for costs is required upon an appeal by an individual to the Circuit Court from a

ruling of the Board of General Appraisers. *In re Certain Merchandise*, 64 Fed. R. 576.

<sup>18</sup> *Knox County v. U. S.*, 131 U. S. clxvi.

<sup>19</sup> *Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co.* (C. C. A.), 73 Fed. R. 814.

<sup>20</sup> *New Orleans Ins. Co. v. Albro Co.*, 112 U. S. 506.

<sup>21</sup> *Volk v. B. F. Sturtevant Co.* (C. C. A.), 99 Fed. R. 532; *Fuller v. Montague*, 53 Fed. R. 204; *supra*, § 200.

<sup>22</sup> *The Presto* (C. C. A.), 93 Fed. R. 522; *Brinkley v. Louisville & N. R. Co.*, 95 Fed. R. 345; *supra*, § 200.

<sup>23</sup> *Ibid.*

§ 510. U. S. R. S., § 1007.

error or appellee within sixty days, Sundays exclusive, after the rendering of the judgment. Security must also be given that the plaintiff in error, if he fail to make his plea good, will answer all damages and costs.<sup>2</sup> The latter security, if filed concurrently with the issue of the citation and the lodging of the writ of error in the clerk's office, or at any time within the said sixty days, Sundays exclusive, may be approved by the judge or justice who signs the citation, and operates as a stay as a matter of right.<sup>3</sup> Otherwise, it can only operate as a stay by the permission of a judge or justice of the appellate court, and then only if the writ of error was sued out and served within the sixty days.<sup>4</sup> Where through a mistake of law an appeal instead of a writ of error was taken within the sixty days, it was held that a *supersedeas* could not be obtained, although a writ of error was subsequently sued out.<sup>5</sup> If a petition for a rehearing is duly filed, or a motion for a new trial duly made, or a motion to set aside the judgment made during the term, the time does not begin to run until the petition or

<sup>2</sup> U. S. R. S., §§ 1000, 1007. A receiver may be relieved from filing a bond to secure a *supersedeas*. Central Tr. Co. v. St. Louis & T. Ry. Co., 41 Fed. R. 551. Cf. Ferguson v. Dent, 29 Fed. R. 1. As to trustees in bankruptcy, see 30 St. at L. 544, 554, § 25; *supra*, § 494. A bond conditioned that the appellants "shall duly prosecute their appeal with effect, and moreover pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed" by the Supreme Court, was held sufficient. Knox County v. U. S., 109 U. S. 229. But see Peace R. Ph. Co. v. Edwards (C. C. A.), 70 Fed. R. 728. A bond conditioned that the plaintiff in error "shall prosecute its writ of error to effect, and answer all damages and costs if it shall fail to make the plea good," was held sufficient. Chateaugay Ore & Iron Co. v. Blake, 35 Fed. R. 804.

As to the form of a *supersedeas* bond, see In re Woerishoffer (C. C.

A.), 74 Fed. R. 915. It has been held to be immaterial that is only signed by one of the plaintiffs in error. McClellan v. Pyeatt (C. C. A.), 49 Fed. R. 259.

<sup>3</sup> U. S. R. S., § 1007; Kitchen v. Randolph, 93 U. S. 86; Danville v. Brown, 128 U. S. 503. Where the dates upon the papers are within the sixty days, it is incumbent upon the appellee to show that the bond was approved *nunc pro tunc*. The Colonel McLeod, 112 U. S. 710.

<sup>4</sup> U. S. R. S., § 1007; Kitchen v. Randolph, 93 U. S. 86; Sage v. Central R. Co. of Iowa, 98 U. S. 412; Peugh v. Davis, 110 U. S. 227; Covington S. Y. Co. v. Keith, 121 U. S. 248.

<sup>5</sup> Saltmarsh v. Tuthill, 12 How. 387. If the writ of error was not sued out within the sixty days, neither the appellate court, nor the court below, nor any judge can grant a *supersedeas*. New England R. Co. v. Hyde (C. C. A.), 101 Fed. R. 397; Logan v. Goodwin (C. C. A.), 101 Fed. R. 654.

motion has been denied.<sup>6</sup> The application for a *supersedeas* should not be made to the appellate court.<sup>7</sup> It has been said that a *supersedeas* bond is not defective because executed before the entry of the decree from which the appeal was taken, if approved and delivered after such entry;<sup>8</sup> but that a *supersedeas* approved after a writ of error has been allowed but not issued is a nullity.<sup>9</sup> The *supersedeas* to a judgment of a state court does not operate until the time when the writ of error, or a copy of the same, is lodged in the clerk's office of the court where the judgment which is to be reviewed was entered.<sup>10</sup> The approval of the bond need not be in writing.<sup>11</sup> The security upon a *supersedeas*, where the judgment or decree is for the recovery of money not otherwise secured,<sup>12</sup> must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal.<sup>13</sup> In suits

<sup>6</sup> *Brockett v. Brockett*, 2 How. 238; *Memphis v. Brown*, 94 U. S. 715; *Texas & Pac. Ry. Co. v. Murphy*, 111 U. S. 488.

<sup>7</sup> *Covington S. Y. Co. v. Keith*, 121 U. S. 248.

<sup>8</sup> *Chateaugay Ore & Iron Co. v. Blake*, 35 Fed. R. 804. The *supersedeas* was allowed when the bond was approved before the writ of error was sued out. *McClellan v. Pyeatt* (C. C. A.), 49 Fed. R. 259.

<sup>9</sup> *Ex parte Ralston*, 119 U. S. 613.

<sup>10</sup> *Foster v. Kansas*, 112 U. S. 201. As to Circuit Courts of Appeal, see *McCarley v. McGhee*, 108 Fed. R. 494. It was said that the bond is executed in the State where it is filed, although signed elsewhere. *Howard Ins. Co. v. Silverberg* (C. C. A.), 94 Fed. R. 921. In case of an appeal from the District Court of Alaska, it was held that filing in the clerk's office below certified copies of the order of a judge of the Circuit Court of Appeals allowing an appeal, of the assignment of errors and of the *supersedeas* bond, together with the original writ of *supersedeas*, was sufficient. *Tornan-see v. Melsing* (C. C. A.), 106 Fed. R. 775, 786; *Re McKenzie*, 180 U. S. 536.

<sup>11</sup> *Davidson v. Lanier*, 4 Wall. 447. Where the judge who signed the citation took the oath of the sureties to their sufficiency, his approval of the bond was presumed. *Silver v. Ladd*, 6 Wall. 440.

<sup>12</sup> S. C. Rule 29; C. C. A. Rule 13; *Fuller v. Aylesworth* (C. C. A.), 75 Fed. R. 694.

<sup>13</sup> S. C. Rule 29; C. C. A. Rule 18. A judgment against a county for the payment of drainage warrants, although it contains a provision for a mandamus, is one for money not otherwise secured. *Fuller v. Aylesworth* (C. C. A.), 75 Fed. R. 694. But see *U. S. v. New Orleans*, 8 Fed. R. 112. It has been held that a decree declaring a lien for a sum of money upon certain property, and directing that the defendant pay the same within sixty days, and, in default of such payment, that plaintiff have leave to apply to the court for further order, is not. *Louisville, N. A. & C. Ry. Co. v. Pope* (C. C. A.), 74 Fed. R. 1. Cf. *Johnson v. Waters*, 108 U. S. 4. It has been held that the *supersedeas* bond upon appeal from a decree upon a creditor's bill subjecting property to the payment of a judg-

where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages; or where the property is in the custody of the marshal under admiralty process, as in the case of a capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court,—indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay and costs and interest on the appeal.<sup>14</sup>

ment must be for the whole amount of the judgment. In re Holladay, 28 Fed. R. 117.

<sup>14</sup>S. C. Rule 29; C. C. A. Rule 13. It has been held that the *supersedeas* bond on an appeal from a decree of foreclosure does not secure payment of the amount of the decree, nor of the interest thereon, nor of a deficiency which may arise upon a sale, Kountze v. Omaha Hotel Co., 107 U. S. 878; nor of a loss by the mortgagee of an opportunity to buy the property at a reduced price on the sale, and make a profit by a subsequent rise of value, Jerome v. McCarter, 21 Wall. 17; but merely the costs, deterioration by waste, and for want of repairs, accumulation of taxes, and loss by fire not covered by reasonable insurance; that it is very doubtful whether it secures against loss by a deterioration of the market value of the property; and that an addition to the statutory condition of a provision that the appellant "shall pay for the use and detention of the property covered by the mortgage during the pendency of the appeal," is nugatory, and does not enlarge the liability of the sureties. Kountze v. Omaha Hotel Co., 107 U. S. 878. Where the decree in a foreclosure suit directed the defendant to account for rents and profits and waste, an additional amount equal to the sum found due

from him was added to the amount of the *supersedeas* bond. National Bank v. McGahan, 45 Fed. R. 280. Upon an appeal to the Supreme Court from a decree for the delivery of coupon bonds, the amount of the *supersedeas* bond was fixed at the aggregate of the coupons already due, and which would accrue in four years with seven per cent. interest and ten per cent. damages on the aggregate of interest besides costs. Massachusetts & S. Const. Co. v. Tp. of Cherokee, 42 Fed. R. 750. On a writ of error to a judgment of ejectment, with nominal damages, the *supersedeas* need not be sufficient to cover the damages which might be recovered in an action for mesne profits, nor, it seems, other similar damages which might be sustained by want of possession. Roberts v. Cooper, 19 How. 873. It has been said that just damages for delay may include any loss arising from the insolvency of stipulators in admiralty. The Sydney, 47 Fed. R. 260, 263. It has been said that the sureties on a *supersedeas* bond in equity are liable for the amount of the decree from which the appeal is taken and for compensation for the delay; but not for any compensation for the delay not imposed upon the principal in the decree of affirmance. It was held that they are not liable for interest upon a

Except in case of a gross abuse of discretion, the action of the judge in approving the amount and sufficiency of the sureties to a *supersedeas* bond will not be reviewed.<sup>15</sup> The appellate court may vacate a *supersedeas*, when the approval of the bond was obtained by fraud and perjury; in such a case it may refuse to accept a new bond;<sup>16</sup> and it may order new security when the circumstances of the sureties or of the parties or of the case have so changed since the bond was approved as to make the security originally given insufficient.<sup>17</sup> Upon an appeal from an interlocutory order or decree granting or continuing an injunction or appointing a receiver, "the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court or by the appellate court or judge thereof during the pendency of such appeal: Provided, further, that the court may require, as a condition of the appeal, an additional bond."<sup>18</sup> "On all appeals from any interlocutory order or decree granting or continuing an injunction in a Circuit or District Court, the appellant shall, at the time of the allowance of the said appeal, file with the clerk of such Circuit or District Court a bond to the opposite party in such sum as such court shall direct, to answer all

fund in the hands of a receiver when the decree of affirmance is silent as to the interest on the same. *Rosenstein v. Tarr*, 51 Fed. R. 368; s. c. affirmed in error as *Tarr v. Rosenstein* (C. C. A.), 53 Fed. R. 112.

<sup>15</sup> *Jerome v. McCarter*, 21 Wall. 17; *Ex parte French*, 100 U. S. 1; *Martin v. Hazard P. Co.*, 93 U. S. 802. But see *Stafford v. Union Bank*, 16 How. 135; s. c., 17 How. 275. The judge may allow the sureties each to bind himself for a part of the penal sum and not to make themselves jointly and severally liable for the whole amount. *New Orleans Ins. Co. v. E. D. Albro & Co.*, 112 U. S. 506. Cf. *Mexican Nat. Const. Co. v. Rensens*, 118 U. S. 49.

<sup>16</sup> *Railroad Co. v. Schutte*, 100 U. S. 644.

<sup>17</sup> *Jerome v. McCarter*, 21 Wall. 17;

*Williams v. Claffin*, 103 U. S. 753; *Martin v. Hazard P. Co.*, 93 U. S. 802. See *Harwood v. Dieckerhoff*, 117 U. S. 200.

<sup>18</sup> 26 St. at L. 826; 31 St. at L. 660. The stay is discretionary, not a matter of right. In *re Haberman Mfg. Co.*, 147 U. S. 525. Cf. *Wakelee v. Davis*, 48 Fed. R. 612. In *Cotting v. Kansas City Stockyards Co.*, 82 Fed. R. 850, a decree was entered dismissing the bill, but an injunction was continued pending an appeal. Where an injunction was continued pending an appeal to the Circuit Court of Appeals from an order for its dissolution, it was held that it still continued after an affirmance by the Circuit Court of Appeals pending a *certiorari* from the Supreme Court. *Stafford v. King* (C. C. A.), 90 Fed. R. 136.



costs if he shall fail to sustain his appeal.”<sup>19</sup> Where an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance make an order suspending or modifying the injunction pending the appeal, upon such terms, as to bond and otherwise, as he may consider proper for the protection of the rights of the opposite party.<sup>20</sup> Otherwise a *supersedeas* upon an appeal from a decree dissolving an injunction does not continue the injunction in force,<sup>21</sup> and a *supersedeas* upon an appeal from a decree granting or continuing an injunction does not suspend the operation of the injunction.<sup>22</sup>

A writ of error to a judgment of conviction of a capital crime in a court of the United States operates as a stay of proceedings without the filing of any bond or other security.<sup>23</sup> A *supersedeas* to a judgment of conviction of another crime is obtained by the service of the writ of error before the return-day, without any security, provided the judge who signs the citation directs that the writ of error operate as a *supersedeas*.<sup>24</sup> Such judge may require security as a condition of the *supersedeas*.<sup>25</sup> In case of a conviction of a capital crime the Supreme Court rules provide that the Circuit or District Court, or any justice or judge thereof, may, after the citation is served, admit the accused to bail in such an amount as may be fixed.<sup>26</sup> A special rule regulates stays upon appeals in *habeas corpus* proceedings.<sup>27</sup> A *supersedeas* operates only in favor of those defendants who have applied for and obtained it.<sup>28</sup> The judgment may be enforced against the rest, although they have joined in the writ of error.<sup>29</sup> An equitable part-owner of real estate was allowed on his appeal a *supersedeas*

<sup>19</sup> C. C. A. Rule 13.

<sup>20</sup> Equity Rule 93.

<sup>21</sup> *Hovey v. McDonald*, 109 U. S. 150, 161; *Slaughter-House Cases*, 10 Wall. 273.

<sup>22</sup> *Knox County v. Harshman*, 132 U. S. 14; *Ozark Land Co. v. Leonard*, 24 Fed. R. 658; *s. c.*, *Leonard v. Ozark Land Co.*, 115 U. S. 465; *Interstate Comm. Com'n v. Louisville & N. R. Co.*, 101 Fed. R. 146.

<sup>23</sup> 25 St. at L., ch. 113, § 6, p. 656.

<sup>24</sup> *In re Claasen*, 140 U. S. 200, 208.

<sup>25</sup> *Ibid.*

<sup>26</sup> S. C. Rule 36; *Hudson v. Parker*, 156 U. S. 277. *Cf.* *U. S. v. Hudson*, 65 Fed. R. 68.

<sup>27</sup> S. C. Rule 34; C. C. A. Rule 33; *supra*, § 368.

<sup>28</sup> *Ex parte French*, 100 U. S. 1.

<sup>29</sup> *Ibid.*

against a writ of possession against the land, although the holder of the legal title, who was the joint equitable owner, had not appealed.<sup>30</sup> An appeal in admiralty, with a *supersedeas*, stays an execution against the stipulators as well as against the principal.<sup>31</sup> A *supersedeas* merely operates as a stay of proceedings; it does not invalidate proceedings perfected before it took effect.<sup>32</sup> It stays further proceedings under an execution previously issued, but it does not set aside a levy previously made.<sup>33</sup> The court in which a judgment was entered has power at the same term to set such judgment aside, and re-enter it so as to give effect to the *supersedeas*.<sup>34</sup> It seems that, notwithstanding a *supersedeas*, the court in which the decree or judgment was entered may, at the same term, correct a clerical error or otherwise perfect the judgment or decree; "since those things which are amendable before error brought are amendable afterwards, so long as diminution may be alleged and *certiorari* awarded; provided, of course, that the time for amendment has not passed by."<sup>35</sup> After an ap-

<sup>30</sup> Hunt v. Oliver, 109 U. S. 177.

<sup>31</sup> The Belgenland, 108 U. S. 153.

<sup>32</sup> Boise County v. Gorman, 19 Wall. 661; s. c., 131 U. S. cxxv; Hovey v. McDonald, 109 U. S. 150, 159. A judgment of ouster in *quo warranto* takes effect upon its rendition and the *status quo* is not reinstated by the *supersedeas*. Olmstead v. Distilling & C. F. Co., 78 Fed. R. 44. Where a writ of error was issued from the Supreme Court to the judgment of a State court removing a State officer, and before the *supersedeas* took effect a successor to such officer was appointed, it was held that such successor was not guilty of contempt by continuing to discharge the duties of his office subsequent to the *supersedeas*. Foster v. Kansas, 112 U. S. 201. The judge who grants the *supersedeas* has the jurisdiction to grant an order that, pending the appeal from an order appointing him, a receiver surrender possession of certain property, and he must obey such direction unless it is vacated. Tornanses v. Mel-

sing (C. C. A.), 106 Fed. R. 775, 788; Re Mackenzie, 180 U. S. 536. Where there is no *supersedeas* a receiver who makes a payment in obedience to a decree or order pending an appeal therefrom incurs no liability in case of a reversal. Hovey v. McDonald, 109 U. S. 150.

<sup>33</sup> Boise County v. Gorman, 19 Wall. 661.

<sup>34</sup> Sage v. Central R. Co. of Iowa, 93 U. S. 412; Memphis v. Brown, 94 U. S. 715.

<sup>35</sup> Hovey v. McDonald, 109 U. S. 150, 157, per Bradley, J. The court may postpone the sale till after the determination of the appeal although there has been no *supersedeas*. Bound v. South Carolina Ry. Co., 55 Fed. R. 186; *supra*, § 316. The attorneys of record have authority, where an appeal from a decree of sale has been taken but no *supersedeas* obtained, to stipulate that the property may be sold and the proceeds paid into court to abide the determination of the appeal; and the purchaser whose pur-

peal in a proceeding *in rem*, or for the foreclosure of a mortgage, has been perfected, the court in which the decree was entered may sell the property in its custody, when perishable, and invest the proceeds;<sup>36</sup> and may allow a receiver to manage it, if a railroad to operate it,<sup>37</sup> and to keep it in repair.<sup>38</sup> Beyond this, the court below should not interfere with the property or its revenue.<sup>39</sup> A Circuit Court has no power to vacate its decree,<sup>40</sup> or allow the answer to be amended and the case opened for further proof,<sup>41</sup> after an appeal therefrom has been perfected, although there is no *supersedeas*. A motion for a new trial may be made in the Court of Claims while an appeal is pending in the Supreme Court.<sup>42</sup> After a writ of error to a judgment of a Circuit Court, that court may issue an injunction to stay proceedings on the judgment.<sup>43</sup>

Where the inferior court proceeds in violation of the *supersedeas*, the appellate court, after the return is filed there, may issue a writ appropriate to the case to stay the proceedings below.<sup>44</sup> A party who has appealed from a decree may be restrained from enforcing any part of it, although there is a cross-appeal by his opponent, and no *supersedeas* has been obtained.<sup>45</sup> Where no *supersedeas* has been obtained, the court below may be compelled by mandamus to enforce its decree, if it refuses to proceed pending an appeal.<sup>46</sup> Where a defective

chase-money has been thus paid into court may retain the property, although the decree is reversed. *Holladay v. Stuart*, 151 U. S. 229.

<sup>36</sup> *Jennings v. Carson*, 4 Cranch, 2; *Spring v. South Carolina Ins. Co.*, 6 Wheat. 519; *Bronson v. La Crosse & M. R. Co.*, 1 Wall. 405.

<sup>37</sup> *Bronson v. La Crosse & M. R. Co.*, 1 Wall. 405.

<sup>38</sup> *Ibid.*; *Grant v. Phoenix M. L. I. Co.*, 121 U. S. 118.

<sup>39</sup> *Bronson v. La Crosse & M. R. Co.*, 1 Wall. 405. The court below should not, after an appeal, at least pending a *supersedeas*, deliver the property in its custody to a third person not a receiver of the same court. *Ibid.* But see *Union Mut. L. Ins. Co. v. Windett*, 36 Fed. R. 838.

<sup>40</sup> *Ensminger v. Powers*, 108 U. S. 292. See *supra*, § 354.

<sup>41</sup> *Western Wheel Scraper Co. v. Drenner*, 79 Fed. R. 820.

<sup>42</sup> *U. S. v. Ayres*, 9 Wall. 608.

<sup>43</sup> *Parker v. The Judges*, 12 Wheat. 561.

<sup>44</sup> *Green v. Van Buskirk*, 8 Wall. 448; *Ex parte Milwaukee R. Co.*, 5 Wall. 188; *Slaughter House Cases*, 10 Wall. 273; *Goddard v. Ordway*, 94 U. S. 672; *Stockton v. Bishop*, 2 How. 74. But see *Bronson v. La Crosse & M. R. Co.*, 1 Wall. 405.

<sup>45</sup> *Bronson v. La Crosse & M. R. Co.*, 1 Wall. 405, 409.

<sup>46</sup> *Stafford v. Union Bank*, 17 How. 275.

*supersedeas* bond has been filed and approved, or a defective writ of error issued, the proper remedy is a motion to vacate the *supersedeas*,<sup>47</sup> or to dismiss the writ of error,<sup>48</sup> as the case may be; not an application for a mandamus to compel the inferior court to enforce the judgment.<sup>49</sup> Upon a motion to vacate a *supersedeas*, so much of the record must be printed as to enable the court to understand the case, unless the parties agree on the facts.<sup>50</sup> Notice of the motion must be given to the appellant or plaintiff in error.<sup>51</sup> In the absence of fraud, on a motion to vacate a *supersedeas* for an amendable defect in the bond, the appellate court will usually order that the *supersedeas* be vacated, unless the appellant or plaintiff in error files a new bond in such a sum and within such a time as may be allowed by the court.<sup>52</sup> When the *supersedeas* bond is a nullity because filed or allowed too late or too soon,<sup>53</sup> or because the writ of error was not sued out or served in time,<sup>54</sup> a motion to vacate the *supersedeas* will be denied as useless. Upon a writ of error to a final order in a condemnation proceeding instituted in a State and removed to a Federal court, the Supreme Court entered an order modifying the *supersedeas*, by directing that it have no greater extent than the State statute allowed in case of an appeal to a State court of review.<sup>55</sup> The issue of an execution against a judgment debtor is not a prerequisite to a proceeding against the sureties on a *supersedeas* bond.<sup>56</sup> An attachment or trustee process from a State

<sup>47</sup> *Power v. Baker*, 112 U. S. 710; *Ex parte French*, 100 U. S. 1.

<sup>48</sup> *Ex parte French*, 100 U. S. 1.

<sup>49</sup> *Power v. Baker*, 112 U. S. 710.

<sup>50</sup> *Wood v. Richards*, 181 U. S. xcvi.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Knox County v. U. S.*, 181 U. S. clxvi. Where the bond failed to name any penal sum permission was given to file a new bond *nunc pro tunc*. *Union Pac. R. Co. v. Callaghan*, 161 U. S. 91.

<sup>53</sup> *Ex parte Ralston*, 119 U. S. 618.

<sup>54</sup> *Western A. L. Cons. Co. v. McGillis*, 127 U. S. 776.

<sup>55</sup> *East Tenn., V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S. 306.

<sup>56</sup> *Babbitt v. Finn*, 101 U. S. 7. The liability of the sureties upon a *super-*

*sedeas* bond to secure loss by the deterioration of attached property is not affected by the omission to enter a personal judgment against the defendant when after the sale there is a deficiency in the amount found to be due the plaintiff. *Dexter, H. & Co. v. Sayward*, 84 Fed. R. 296. *Cf. s. c.*, 79 Fed. R. 237. Nor are they relieved because the plaintiff in error failed to state what was necessary to give jurisdiction to the Circuit Court of Appeals. *Ibid.* A suit may be brought against the sureties upon the filing of the mandate below without waiting for the entry of judgment upon that mandate. *Davis v. Patrick (C. C. A.)*, 57 Fed. R. 909.

court against the sureties to a *supersedeas* bond in a suit against the obligee is no defense to a suit in the Federal court on the *supersedeas* bond.<sup>57</sup> It is the practice in admiralty in the Second Circuit,<sup>58</sup> and in Fifth Circuit, in all cases in Alabama, where the State practice permits this,<sup>59</sup> on entering a decree of affirmance, for the Circuit Court to give summary judgment against the obligors on the *supersedeas* bond.

§ 511. Return to writ of error or appeal.—A writ of error should be returned to the appellate court on or before the return-day thereof, together with an authenticated transcript of the record, an assignment of errors, a prayer for a reversal, and the original citation to the adverse party, all of which should be annexed thereto.<sup>1</sup> If, however, the writ is served

<sup>57</sup> *Rosenstein v. Tarr*, 51 Fed. R. 368; s. c. as *Tarr v. Rosenstein* (C. C. A.), 58 Fed. R. 112.

<sup>58</sup> *The Sydney*, 47 Fed. R. 260, 262; *The Wanata*, 95 U. S. 600; *The Belgenland*, 108 U. S. 153. See also *Hiriart v. Ballon*, 9 Pet. 156; *Beall v. New Mexico*, 16 Wall. 535; *Marchand v. Frellsen*, 105 U. S. 423; *Ex parte Sawyer*, 21 Wall. 235; *Babbitt v. Shields*, 101 U. S. 7.

<sup>59</sup> *Gordon v. Third Nat. Bank* (C. C. A.), 56 Fed. R. 790; s. c., *Third Nat. Bank v. Gordon*, 53 Fed. R. 471. See *Humes v. Third Nat. Bank*, 54 Fed. R. 917; s. c., *In re Humes*, 149 U. S. 192. An order denying a motion for a summary judgment against the sureties was held, in the district of Washington, to be no bar to a subsequent suit against them. *Dexter, H. & Co. v. Sayward*, 84 Fed. R. 296.

§ 511. <sup>1</sup> U. S. R. S., § 997; *Wilson v. Daniel*, 3 Dall. 401; S. C. Rule 35. The copy of the record is sufficiently authenticated if there is attached to the same a certificate that the writing thereto attached is a true transcript of the record, signed by the clerk or his deputy, and under the seal of the court. *Garneau v. Dozier*, 100 U. S. 7; *Missouri, K. & T. Ry.*

*Co. v. Dinsmore*, 108 U. S. 30; S. C. Rule 8; C. C. A. Rule 14. It has been held that a certificate that the "foregoing is a true, full and complete record in the above entitled cause" is sufficient, *Pennsylvania Co. v. Jacksonville, T. & K. W. Ry. Co.* (C. C. A.), 55 Fed. R. 131; but not a certificate that the papers contained in the transcript are correct copies without a statement that the transcript is complete, *Meyer v. Mansur & T. I. Co.* (C. C. A.), 85 Fed. R. 874; but see *Burnham v. No. Chicago St. R. Co.* (C. C. A.), 87 Fed. R. 168; nor a certificate to the correctness of the copies of the pleadings which is silent as to the copies of the orders and decrees. *Ruby v. Atkinson* (C. C. A.), 93 Fed. R. 577. When the transcript is sent to the Circuit Court of Appeals, a statement in the certificate that it is made for the Supreme Court is immaterial. *McClellan v. Pyeatt* (C. C. A.), 49 Fed. R. 259. The seal and signature are both requisite. S. C. Rule 8; C. C. A. Rule 14. Leave has been given to withdraw the record and file the same *nunc pro tunc* with the clerk's signature added thereto, when the seal was affixed to the record and a motion to dismiss for the want of the clerk's sig-

before the return-day, the appellate court may allow the writ or the transcript to be filed at any time during the term in which the return-day falls.<sup>2</sup> The destruction of the writ without the fault of the plaintiff in error will excuse a return of the original paper, provided a copy of the writ and the transcript and other papers are duly filed.<sup>3</sup> The return-day of an appeal is the day named in the citation. The record must be complete, and contain in itself without references *aliunde* all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing.<sup>4</sup> A copy of the opinion or opinions filed in the case must be annexed to and transmitted with

nature was made after the time to appeal had expired. *Idaho & Oregon L. Imp. Co. v. Bradbury*, 132 U. S. 502, 513. *Cf.* *Burnham v. No. Chicago St. Ry. Co. (C. C. A.)*, 87 Fed. R. 168. Where the seal and signature were both wanting, the court dismissed the writ of error, but allowed the plaintiff in error to withdraw the record and sue out a new writ, since his time had not expired. *Blitz v. Brown*, 7 Wall. 693.

<sup>2</sup> *Mussina v. Cavazos*, 6 Wall. 855, 859; *Wood v. Lide*, 4 Cranch, 180; *Pickett v. Legerwood*, 7 Pet. 144.

<sup>3</sup> *Mussina v. Cavazos*, 6 Wall. 855.

<sup>4</sup> S. C. Rule 8; C. C. A. Rule 14; *Redfield v. Parks*, 130 U. S. 623. See *Hoe v. Kahler*, 27 Fed. R. 145. The original pleadings which have been amended need not be included in the transcript when the amended pleadings are included. *Union Pacific Ry. Co. v. U. S.*, 116 U. S. 402. On a second appeal from the Court of Claims, findings of fact on the first hearing in a decision reversed upon the former appeal need not be included in the transcript. *Union Pac. Ry. Co. v. U. S.*, 116 U. S. 402. See *supra*, § 485; *infra*, § 513. The transcript need not contain the names of the jurors. *Owens v. Hanney*, 9 Cranch, 180. The transcript should not contain affidavits on a motion for a continuance. *Campbell v. Rankin*, 99

U. S. 201. Nor affidavits which were considered upon a motion for a new trial. *Evans v. Stettinisch*, 149 U. S. 605. Nor any affidavits not admitted in evidence on a trial or hearing. *Baltimore & P. R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127; *England v. Gebhardt*, 112 U. S. 502; *Craig v. Smith*, 100 U. S. 226; *Thomson v. Wooster*, 114 U. S. 104; *Travelers' Protective Ass'n v. Gilbert (C. C. A.)*, 101 Fed. R. 46. Affidavits can only be considered upon a writ of error when they are included in the bill of exceptions. *Evans v. Stettinisch*, 149 U. S. 605; *Stewart v. Wyoming C. R. Co.*, 128 U. S. 383, 390. Nor any letters or other papers not contained or referred to in the bill of exceptions or incorporated in a pleading. *San Pedro & Canon A. A. Co. v. U. S.*, 146 U. S. 120; *Whitten v. Tomlinson*, 160 U. S. 231; *Travelers' Protective Ass'n v. Gilbert (C. C. A.)*, 101 Fed. R. 46. All such papers will be disregarded by the court of review. *Ibid.*; *Suydam v. Williamson*, 20 How. 427; *Duncan v. Atchison, T. & S. F. R. Co. (C. C. A.)*, 72 Fed. R. 808. The fact that a paper is on the files of the clerk's office with other papers in a case does not make it part of the record, if it is neither a pleading nor a process, nor made a part of the record by the action of the court. *England v. Gebhardt*, 112 U. S. 502. The court



the record.<sup>5</sup> The practice as to transcripts of the record in admiralty<sup>6</sup> and upon appeals from the Court of Claims<sup>7</sup> has been previously described.

When in the opinion of the presiding judge in any Circuit Court, or District Court exercising the jurisdiction of a Circuit

of first instance has no power to revise the record and expunge matter that is not impertinent nor scandalous in order to shorten the transcript. *Smith v. McIntyre*, 84 Fed. R. 721. But see *Hoe v. Kahler*, 27 Fed. R. 145.

The transcript filed by complainant must contain the proceedings upon a cross-bill which has been dismissed when the complainant to the cross-bill has appealed, even though the complainant has not named him as appellee; and the court as an alternative to granting a motion to dismiss may compel the complainant to supply an omission of such proceedings instead of taking the more dilatory course of a writ of *certiorari* for diminution of the record. *Gregory v. Pike*, 64 Fed. R. 415. Where there has been a previous appeal, matters which preceded the mandate thereupon and which do not tend to explain it should ordinarily be omitted. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (C. C. A.), 61 Fed. R. 237. Proceedings upon an application for a rehearing which tend to explain the original decree may be included. *Hoe v. Kahler*, 27 Fed. R. 145. Where several distinct proceedings are pending about the same matter below, nothing should be included in the record which does not have some relation to that in which was entered the order from which the appeal is taken. *Burnham v. North Chicago Ry. Co.* (C. C. A.), 87 Fed. R. 168. But see *Fitzgerald v. Evans* (C. C. A.), 49 Fed. R. 426.

It is proper for the clerk to require of the attorney for the appellant or

plaintiff in error a *præcipe* stating what the transcript should contain, and to attach a copy thereof to the same. It has been held that, in such a case, where the record is voluminous, a certificate will be sufficient which states that the transcript is a full and correct copy of everything specified in the *præcipe*, *Burnham v. North Chicago Ry. Co.* (C. C. A.), 87 Fed. R. 168; and that the appeal or writ of error will not be dismissed for omissions thus made at the direction of the attorney for the plaintiff in error or appellant, the proper remedy being a *certiorari* for a diminution of the record. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (C. C. A.), 61 Fed. R. 237. The more usual practice is for the parties or their attorneys to stipulate what the transcript shall contain. It is proper to omit parts of depositions which neither party offered in evidence. *Blanks v. Klein* (C. C. A.), 49 Fed. R. 1. Where parts of the record are omitted the transcript should indicate the fact and the nature of the omission. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (C. C. A.), 61 Fed. R. 237. Where part of the records of the court below had been destroyed by fire without the fault of either party, the Circuit Court of Appeals heard an appeal on a transcript of what remained. *Cutting v. Tavares, O. & A. R. Co.*, 61 Fed. R. 150.

<sup>5</sup> S. C. Rule 8; C. C. A. Rule 14.

<sup>6</sup> *Supra*, § 429. See C. C. A. Rule 14; Adm. Rule 52; S. C. Rule 8; Adm. Rules, 2d Ct., 4, 5.

<sup>7</sup> *Supra*, § 457. See *Old Settlers v. U. S.*, 148 U. S. 427, 463, 464.

Court, it is necessary or proper that original papers of any kind be inspected in the appellate court on appeal or writ of error, such presiding judge may make such rule or order for the safe-keeping, transport, and return of such papers as he deems proper, and the Supreme Court will receive and consider such original papers in connection with the transcript and proceedings.<sup>8</sup> Whenever any record contains any document, paper, testimony, or other proceeding in a foreign language, the record must also contain a translation thereof made under the authority of the inferior court or admitted to be correct.<sup>9</sup> Otherwise, on the report of the clerk, the court of review will remand the case to the inferior court in order that such a translation may be there supplied and inserted in the record.<sup>10</sup>

“1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted. 2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.”<sup>11</sup>

It is the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of the appellate court before the return-day, which must be within thirty days after the signature of the citation,<sup>12</sup> except in the Supreme Court, on appeals or writs of error from California, Oregon, Washington, New Mexico, Utah, Nevada, Arizona, Montana, and Idaho, when the period of thirty days is extended to sixty days.<sup>13</sup>

<sup>8</sup> S. C. Rule 8; C. C. A. Rule 14.

<sup>9</sup> S. C. Rule 11; C. C. A. Rule 15.

<sup>10</sup> S. C. Rule 11; C. C. A. Rule 15.

<sup>11</sup> S. C. Rule 88; C. C. A. Rule 84.

<sup>12</sup> S. C. Rules 8 and 9; C. C. A. Rule

14.

<sup>13</sup> S. C. Rule 9.

If the plaintiff in error or appellant fails to docket the case and file the record in time, he may for good cause shown obtain from the judge who signed the citation or a judge of the appellate court an order enlarging his time either before or after its expiration, at least before the term succeeding the return-day has expired.<sup>14</sup> This order must be filed with the clerk of the appellate court.<sup>15</sup> If the plaintiff in error or appellant fails to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal was duly sued out and allowed.<sup>16</sup> After such dismissal, the plaintiff in error or appellant can only by special leave of the court docket the case and file the record.<sup>17</sup>

It seems that if the record is not filed in the appellate court at the term succeeding that at which the appeal is allowed or the writ of error issued, the appeal or writ of error becomes void, and the appellate court will of its own motion dismiss the appeal.<sup>18</sup> Where an appellant or plaintiff in error without fault on his part was prevented from filing the transcript by the fraud of his opponent or the contumacy of the clerk or the order of the court below, his time to file the transcript was enlarged.<sup>19</sup> A mandamus or other appropriate order may issue

<sup>14</sup> S. C. Rule 9; C. C. A. Rule 16. An order extending the time to file the return, made by a district judge who is not a member of the Circuit Court of Appeals when he signs it, is a nullity. *West v. Irwin*, 54 Fed. R. 419, 420.

<sup>15</sup> S. C. Rule 9; C. C. A. Rule 16.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Castro v. U. S.*, 8 Wall. 46; *Small v. Northern Pac. R. Co.*, 134 U. S. 514; *West v. Irwin* (C. C. A.), 54 Fed. R. 419. See Amendment of Rules, 137 U. S. 710; C. C. A. Rules 14, 16.

<sup>19</sup> *U. S. v. Gomez*, 8 Wall. 752; *Ableman v. Booth*, 21 How. 506, 512. The failure to docket in time is not excused by the fact that the clerk below agreed to file the record, and

it was left with him for that purpose, *Fayolle v. Texas & Pac. Ry. Co.*, 124 U. S. 519; nor by his certificate that he could not, consistently with his other duties, return a transcript of the record within the required time, *Sturgess v. Harrold*, 18 How. 40; nor by his mistake as to the return-day, *Richardson v. Green*, 130 U. S. 104. But where the transcript was filed within the time required by the rule, but a few days after the return-day, the delay was excused. *Florida v. Charlotte H. Ph. Co.* (C. C. A.), 70 Fed. R. 883; *Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co.* (C. C. A.), 73 Fed. R. 314; *McClellan v. Pyeatt* (C. C. A.), 49 Fed. R. 259.

to compel the clerk to certify to a transcript of the record;<sup>20</sup> but a failure to move for a mandamus will not necessarily be considered laches by the plaintiff in error.<sup>21</sup> A case which is sought to be reviewed both by appeal and by writ of error need not be docketed twice.<sup>22</sup>

The plaintiff in error or appellant must on docketing a cause and filing the record enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.<sup>23</sup> Where the transcript had been filed in time, but through inadvertence a fee bond had not been given to the clerk, the appellant was permitted to docket the cause after the term, in a case where no motion to dismiss had been made.<sup>24</sup> The defendant in error or appellee may, if he chooses, docket the cause and file the record. Upon the filing of a transcript of the record, the appearance of the counsel for the party docketing the cause should be entered.<sup>25</sup> If the defendant in error files the transcript or docket the cause before the time has expired, and subsequently the plaintiff in error files the transcript and docket the cause in due time, the case on the plaintiff's docketing will stand and on the defendant's docketing be dismissed.<sup>26</sup> It has been held that a writ of error or appeal may be dismissed because no assignment of error is sent up with the return.<sup>27</sup>

A writ of error or appeal will not be dismissed because the transcript is defective, if properly authenticated.<sup>28</sup> If the transcript of the record is defective, the remedy is a *certiorari* for a diminution of the record.<sup>29</sup> A motion for such a writ should be made at the first term of the entry of the cause, unless upon

<sup>20</sup> U. S. v. Booth, 18 How. 476; U. S. v. Gomez, 8 Wall. 572. But not, it has been held, to compel him to transmit a particular paper. Staroke v. Klein (C. C. A.), 62 Fed. R. 502.

<sup>21</sup> U. S. v. Gomez, 8 Wall. 752.

<sup>22</sup> Hurst v. Hollingsworth, 94 U. S. 111; Plymouth G. M. Co. v. Amador & S. C. Co., 118 U. S. 264.

<sup>23</sup> S. C. Rule 10.

<sup>24</sup> Edwards v. U. S., 102 U. S. 575; *contra*, Green v. Elbert, 137 U. S. 615.

<sup>25</sup> S. C. Rule 9.

<sup>26</sup> Hartshorn v. Day, 18 How. 28; Davis v. Corbin, 113 U. S. 687.

<sup>27</sup> S. C. Rule 35; C. C. A. Rule 11; Dufour v. Lang (C. C. A.), 54 Fed. R. 913. But see School Dist. of Ackley v. Hall, 106 U. S. 428; Gumbel v. Pitkin, 113 U. S. 545; S. C. Rule 35, as first adopted, 137 U. S. 709.

<sup>28</sup> S. C. Rule 14; C. C. A. Rule 18; Nashua & L. R. Corp. v. Boston & L. R. Corp. (C. C. A.), 61 Fed. R. 737.

<sup>29</sup> *Ibid.*; U. S. v. Davenport's Heirs, 142 U. S. 704; U. S. v. Gomez, 1 Wall. 690; Missouri, K. & T. Ry. Co. v. Dinsmore, 108 U. S. 80.

special cause shown an application at a later term is permitted.<sup>30</sup> An application made within a reasonable time after the record is printed will usually be granted.<sup>31</sup> The appellate court may grant the writ of its own motion at any time.<sup>32</sup> Pending such a writ, the hearing of the cause is usually adjourned;<sup>33</sup> but not if the application has been unreasonably delayed.<sup>34</sup> The clerk may supply a deficiency in the record by subsequently sending up the omitted matter properly authenticated without any further order of the court;<sup>35</sup> and it has been held the court of first instance may direct omitted matter to be supplied,<sup>36</sup> or amend the return,<sup>37</sup> at least at the same term.<sup>38</sup> But it seems that leave to file the same must be obtained from the court of review.<sup>39</sup> The clerk cannot in this manner correct an erroneous statement in the transcript.<sup>40</sup> A *certiorari* for diminution of the record is not the proper remedy when the clerk has failed to properly authenticate the record.<sup>41</sup> The record may be amended in the appellate court by consent;<sup>42</sup> and in a case where it was evident from an inspection of the transcript that it contained a clerical error, the Supreme Court permitted it to be corrected by amendment, on the production of the certificate of the clerk below as to the error, without a *certiorari*.<sup>43</sup> Defects in a transcript cannot be supplied by reference to the record in another appeal.<sup>44</sup>

In a proper case and under proper restrictions, pending an application for a rehearing below, the appellate court may re-

<sup>30</sup> S. C. Rule 14; C. C. A. Rule 18.

<sup>31</sup> *Bein v. Heath*, 142 U. S. 704.

<sup>32</sup> *Morgan v. Curtenius*, 19 How. 8; *Sweeney v. Lomme*, 22 Wall. 208.

<sup>33</sup> *Morgan v. Curtenius*, 19 How. 8. But see *Bein v. Heath*, 142 U. S. 704.

<sup>34</sup> *Bein v. Heath*, 142 U. S. 704.

<sup>35</sup> *Crandall v. Nevada*, 6 Wall. 35.

<sup>36</sup> *Hobbs v. Nat. Bank of Commerce* (C. C. A.), 93 Fed. R. 615; *Lincoln Nat. Bank v. Perry* (C. C. A.), 66 Fed. R. 887; *Whiting v. Equitable L. A. Soc.* (C. C. A.), 60 Fed. R. 197. But see *Smith v. McIntyre*, 84 Fed. R. 721.

<sup>37</sup> *Lincoln Nat. Bank v. Perry* (C. C. A.), 66 Fed. R. 887; *Rollins v. Board of Com'rs of Gunnison County* (C. C. A.), 78 Fed. R. 741.

<sup>38</sup> *Whiting v. Eq. L. A. Soc.* (C. C. A.), 60 Fed. R. 197; *Rollins v. Board of Com'rs of Gunnison County* (C. C. A.), 78 Fed. R. 741.

<sup>39</sup> *Tellunde Power Transp. Co. v. Rio Grande W. Ry. Co.*, 175 U. S. 639; *Burnham v. N. Chicago St. Ry. Co.* (C. C. A.), 87 Fed. R. 168.

<sup>40</sup> *Hudgins v. Kemp*, 18 How. 530.

<sup>41</sup> *Barings v. Dabney*, 19 Wall. 1.

<sup>42</sup> *Fletcher v. Peck*, 6 Cranch, 87.

<sup>43</sup> *Woodward v. Brown*, 13 Pet. 1; *Stitt v. Huidekopers*, 17 Wall. 384. See *Kennedy v. Bank of Georgia*, 8 How. 586; *Shaw v. Railroad Co.*, 101 U. S. 557.

<sup>44</sup> *South Carolina v. Wesley*, 155 U. S. 542.

turn the record at the request of the court below, but not, it seems, at the request of the parties.<sup>45</sup> The Supreme Court has allowed a transcript to be returned to the court below for correction, by the addition of the clerk's signature, after the time to take a new appeal had expired.<sup>46</sup> The Supreme Court, after the dismissal of a writ of error on the motion of the plaintiff in error, refused to allow the transcript to be withdrawn.<sup>47</sup>

**§ 512. Motions to dismiss appeals and writs of error.—**Motions to dismiss writs of error and appeals may be made upon the following grounds: For want of jurisdiction; abatement;<sup>1</sup> for irregularities or informalities in the papers; for the failure of the plaintiff in error or appellant to perfect the appeal or proceedings in error; for the abandonment of the appeal or writ of error by the plaintiff in error or appellant; upon the consent of the parties; because the controversy has been settled pending the appeal or writ of error; and because the suit is fictitious and there is no real controversy between the parties. Cross-appeals may be dismissed upon the same grounds as original appeals.<sup>2</sup>

A writ of error or appeal may be dismissed for want of jurisdiction on the motion of the appellate court without the suggestion of either party.<sup>3</sup> A writ of error or appeal will not be

<sup>45</sup> *Roemer v. Simon*, 91 U. S. 149.

<sup>46</sup> *Idaho & Oregon L. Imp. Co. v. Bradbury*, 132 U. S. 509.

<sup>47</sup> *Cheney v. Hughes*, 138 U. S. 403. But see *Porter v. Foley*, 21 How. 393; *Rice v. Minnesota & N. W. R. Co.*, 21 How. 82.

§ 512. <sup>1</sup> An abatement may occur by the death of a sole party on either side where the plaintiff has failed below and the cause of action does not survive, *Martin's Adm'r v. Balt. & O. R. Co.*, 151 U. S. 673, 703; by the failure of the plaintiff in error or appellant to revive the suit after due notice of the death of a party, S. C. Rule 9; C. C. A. Rule 19; *supra*, §§ 373, 505; by the retirement from office of an officer sued solely in his official capacity, *Lansing & Co. v. Hesing* (C. C. A.), 81 Fed. R. 242; by the reversal of a judgment upon

which the decree below was founded, *Chicago & V. R. Co. v. Fosdick*, 106 U. S. 47, 84, 85; by the subsequent probate of a will when the appellant's claims are founded upon a supposed intestacy, *Kimball v. Kimball*, 174 U. S. 158; and by the repeal without a saving clause of the statute upon which the jurisdiction of the appellate court depends. *Ex parte McCordle*, 7 Wall. 506; *Balt. & P. R. Co. v. Grant*, 98 U. S. 398. Where the act which gave the jurisdiction to the court of first instance was repealed after a judgment for the plaintiff, the appeal was dismissed. *U. S. v. McCrory* (C. C. A.), 91 Fed. R. 295.

<sup>2</sup> *L. Bucki & Son L. Co. v. Atl. L. Co.* (C. C. A.), 63 Fed. R. 765; *Hilton v. Dickinson*, 108 U. S. 165.

<sup>3</sup> *Hilton v. Dickinson*, 108 U. S. 165; *New Orleans Nat. Banking Ass'n v.*



dismissed for want of jurisdiction of the court below.<sup>4</sup> In such a case the court of review will take jurisdiction and reverse the judgment or decree.<sup>5</sup> A writ of error to a State court will be dismissed unless it shows at least a color of ground for the averment of a Federal question.<sup>6</sup> The Supreme Court cannot dismiss a cause on motion, because it was brought there for delay only, nor because the grounds of the appeal or writ of error are frivolous, unless a motion to affirm is coupled with the motion to dismiss.<sup>7</sup> Two concurrent appeals from the same order or decree by the same party are not allowed, and on motion the court will determine which of the two should be dismissed.<sup>8</sup> The allowance of an appeal which afterwards becomes of no avail, from failure to file the record and prosecute it, is no bar to a second appeal, within the time allowed by law.<sup>9</sup> A writ of error or appeal may be dismissed where it appears upon the examination of affidavits and counter-affidavits filed in the appellate court, that the value of the property in dispute is less than the jurisdictional amount.<sup>10</sup> Motions to dismiss writs of error and appeals for irregularities and informalities in the papers are of less importance now than formerly, on

New Orleans Mut. Ins. Ass'n, 102 U. S. 121. So of the objection that there is a defect of parties to the appeal or writ of error. *Estis v. Trabue*, 128 U. S. 225; *Ayres v. Polsdorfer* (C. C. A.), 105 Fed. R. 737; and cases cited *supra*, § 505. A writ of error by the receiver of a national bank will not be dismissed because the Comptroller in his direction to sue out the writ incorrectly named the defendant in error. *Pacific Nat. Bank v. Mixer*, 114 U. S. 463.

<sup>4</sup> *Harris v. Barber*, 129 U. S. 866; *Pike v. Gregory* (C. C. A.), 94 Fed. R. 373; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (C. C. A.), 51 Fed. R. 929, 930; and cases cited *infra*, § 517.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Hamblin v. Western Land Co.*, 147 U. S. 531.

<sup>7</sup> *Amory v. Amory*, 91 U. S. 356; *Bohanan v. Nebraska*, 118 U. S. 231. *Cf.* *Citizens' Bank v. Farwell* (C. C. A.), 56 Fed. R. 539.

<sup>8</sup> *Wheeler v. Harris*, 13 Wall. 51.

<sup>9</sup> *Evans v. State Nat. Bank*, 134 U. S. 330.

<sup>10</sup> *Wells v. Wilkins*, 116 U. S. 393. See *supra*, § 504. Where an appeal has been allowed after a contest as to the value of the matter in dispute, it will not be dismissed because the court may be of the opinion that possibly the estimates acted upon below were too high, if there is no decided preponderance of evidence against jurisdiction. *Gage v. Pumphelly*, 108 U. S. 164. See also *Zeigler v. Hopkins*, 117 U. S. 683. Where the court below had failed to give due effect to a *remittitur* or release of part of the recovery, the Supreme Court modified the judgment so as to give due effect to the *remittitur*, and affirmed the judgment as thus modified so as to be less than the jurisdictional amount without examining the other assignments of error. *Simms v. Simms*, 175 U. S. 162.

account of the statute allowing amendments in nearly every case of an irregularity or informality.<sup>11</sup> No motion to dismiss will be granted because the transcript filed is incomplete, if properly certified.<sup>12</sup> An appeal will not be dismissed because a *supersedeas* has been improperly awarded.<sup>13</sup> The proper remedy in such a case is a motion to vacate the *supersedeas* if the *supersedeas* is irregular;<sup>14</sup> and a proceeding to enforce the judgment or decree below, if the *supersedeas* is void.<sup>15</sup> An appeal will not be dismissed because the statement of facts found by the court and its conclusions of law thereon are not a sufficient compliance with the rules of the Supreme Court on that subject.<sup>16</sup> A writ of error has been dismissed for the failure to annex to the transcript an assignment of errors.<sup>17</sup> The objection that the plaintiff in error or appellant has failed to perfect the appeal or writ of error must be taken by a preliminary motion to dismiss the writ of error or appeal for irregularity;<sup>18</sup> and in many cases it will be waived by the appearance of the defendant in error or respondent in the appellate court for a term without a motion to dismiss.<sup>19</sup> Such an appearance and delay is a waiver of the objection that the citation has not been served;<sup>20</sup> and a waiver of the objections that the citation is signed by a different judge from the one who allowed the appeal,<sup>21</sup> and that the return-day named in the writ is too late.<sup>22</sup> Where a motion is made to dismiss an appeal upon the ground that no appeal bond has been given, or approved, or citation served, the court will usually give a reason-

<sup>11</sup> U. S. R. S., § 1005. See *supra*, § 507.

<sup>12</sup> U. S. v. Davenport's Heirs, 142 U. S. 704; Gregory v. Pike, 64 Fed. R. 415. See *supra*, § 511.

<sup>13</sup> Hudgins v. Kemp, 18 How. 530.

<sup>14</sup> Knox County v. U. S., 131 U. S. clxvi; *supra*, § 510.

<sup>15</sup> Ex parte Ralston, 119 U. S. 618; Western A. L. Const. Co. v. M'Gillis, 127 U. S. 776; *supra*, § 510.

<sup>16</sup> U. S. v. Adams, 6 Wall. 101.

<sup>17</sup> Dufour v. Lang (C. C. A.), 54 Fed. R. 913. See S. C. Rule 35; C. C. A. Rule 11; Benites v. Hampton, 123 U. S. 519. But see School Dist. v.

Hall, 106 U. S. 428; Gumbel v. Pitkin, 113 U. S. 545.

<sup>18</sup> Mandeville v. Riggs, 2 Pet. 482.

<sup>19</sup> U. S. v. Armejo, 131 U. S. lxxxii; Pierce v. Cox, 9 Wall. 786; Buckingham v. McLean, 13 How. 150; Radford v. Folsom, 123 U. S. 725.

<sup>20</sup> U. S. v. Armejo, 131 U. S. lxxxii; Pierce v. Cox, 9 Wall. 786; Buckingham v. McLean, 13 How. 150; Radford v. Folsom, 123 U. S. 725; Chaffee v. Hayward, 20 How. 208.

<sup>21</sup> Aldrich v. Ætna Co., 8 Wall. 491; Sage v. Railroad Co., 96 U. S. 712.

<sup>22</sup> Freeman v. Clay, 48 Fed. R. 849.

able time,<sup>23</sup> in one case sixty days,<sup>24</sup> to file the bond.<sup>25</sup> Where a writ of error or appeal is not docketed, and the transcript not filed during the term succeeding the return-day, the appellate court loses jurisdiction thereof; and the case will be dismissed without an opportunity to perfect the same.<sup>26</sup> The fact that the appellee or defendant in error has failed to file the record and docket the cause within the time prescribed does not deprive him of the right to have the cause dismissed.<sup>27</sup> If the plaintiff in error or appellant fails to docket the case with the clerk of the appellate court before the return-day, whether in vacation or in term, unless his time has been enlarged by the justice or judge who signed the citation or by a judge or justice of the appellate court, which enlargement can only be by an order to be filed with the clerk of the appellate court, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out and allowed.<sup>28</sup> A writ of error will be dismissed when the plaintiff in error refuses to give the clerk security for his fees.<sup>29</sup>

When the case is reached on the calendar of the appellate court and no counsel appears and no brief has been filed for the plaintiff in error or appellant, the defendant in error or respondent may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.<sup>30</sup> A writ of error cannot be dismissed for want of the appearance of counsel for the plaintiff in error before it

<sup>23</sup> *Anson v. Blue Ridge R. Co.*, 23 How. 1; *Richardson v. Green*, 130 U. S. 104; *Freeman v. Clay*, 48 Fed. R. 849; *O'Reilly v. Edrington*, 96 U. S. 724. See *supra*, § 486.

<sup>24</sup> *Anson v. Blue Ridge R. Co.*, 23 How. 1.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Killian v. Clark*, 111 U. S. 784; *Radford v. Folsom*, 123 U. S. 725. See authorities cited *supra*, § 511.

<sup>27</sup> *U. S. v. Fremont*, 18 How. 80.

<sup>28</sup> S. C. Rule 9; C. C. A. Rule 16.

<sup>29</sup> *Owings v. Tiernan*, 10 Peters, 447; *supra*, § 511.

<sup>30</sup> S. C. Rule 16; C. C. A. Rule 23. This rule of the Circuit Court of Appeals does not apply when there is a call of the entire docket at the beginning of the term, and a case is then called in order to appoint a day for the argument, but is not actually reached for argument. *Lem Hing Dun v. U. S. (C. C. A.)*, 49 Fed. R. 145. A cross-appeal will be dismissed if not ready for argument when the original appeal is called, unless reason for a postponement is shown. *L. Bucki & Son L. Co. v. Atlantic C. L. Co. (C. C. A.)*, 98 Fed. R. 765.

is reached on the calendar.<sup>31</sup> When a case is reached for argument on the regular call of the docket and there is no appearance of either party, the case will be dismissed at the cost of the plaintiff in error or appellant.<sup>32</sup> Such a default may for good cause be opened at the same term.<sup>33</sup> When a case is called for argument in the Supreme Court at two successive terms and upon the second term no one is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless good cause to the contrary is shown.<sup>34</sup> When the plaintiff in error or appellant fails on the argument to submit a brief such as is required by Supreme Court Rule 21, or Circuit Court of Appeals Rule 24, the case may be dismissed.<sup>35</sup> A writ of error or appeal may be dismissed on the consent of both parties thereto. In the Supreme Court it seems that in term time a motion founded upon a stipulation for such dismissal should be made in open court before the case will be dismissed. In vacation in the Supreme Court and at all times in the Circuit Courts of Appeals, whenever plaintiff and defendant in error, or appellant and appellee, sign and file with the clerk of the appellate court an agreement in writing through their attorneys of record directing the case to be dismissed and specifying the terms on which it is to be dismissed as to costs, and pay to the clerk any fees that may be due to him, it is the duty of the clerk to enter the case dismissed, and give a copy of the agreement to the parties requesting it, but no mandate or other process will issue without the order of the court.<sup>36</sup> In

<sup>31</sup> *Larman v. Tisdale*, 142 U. S. 705.

<sup>32</sup> S. C. Rule 18; C. C. A. Rule 22.

<sup>33</sup> *Rosenthal v. Coates*, 148 U. S. 142.

<sup>34</sup> S. C. Rule 19; C. C. A. Rule 17.

<sup>35</sup> S. C. Rule 21; C. C. A. Rule 24; *Benites v. Hampton*, 128 U. S. 519. See *infra*, § 514.

<sup>36</sup> S. C. Rule 28; C. C. A. Rule 20. Where, after an order of dismissal on such a stipulation in vacation, but before a mandate had issued, a third party intervened, claiming that he had previously bought the rights of the plaintiff in error, and that the dismissal was in fraud of his rights, the order of dismissal was amended by adding the words: "without prej-

udice to the right of Albert M. Henry to proceed as he may be advised in the court below, for the protection of his interest." *Woodman v. Missionary Soc.*, 124 U. S. 161. Where it was suggested to the Supreme Court that a cause had been compromised, the debt, which the suit was brought to collect, paid, and a stipulation made that the plaintiff in error dismiss the suit; it was ordered that, unless the plaintiff in error show cause to the contrary on or before a motion day two weeks hence, the writ of error be dismissed, service of the order to show cause to be made on the counsel for the plaintiff

the Supreme Court no affidavits or other papers can be filed with such a stipulation.<sup>37</sup>

An appeal or writ of error will not be dismissed on the motion of the plaintiff in error or appellant, without the consent of the defendant or respondent, except on motion and for special reasons.<sup>38</sup> It is usual in the Supreme Court to grant leave

in error, in Texas, by the clerk of the Supreme Court through the mail. *Addington v. Burke*, 125 U. S. 698. In a case where appeals were being prosecuted by the order of the directors of a corporation, the Supreme Court refused to dismiss such appeals on the motion of parties who claimed to be holders of a majority of the stock of the corporation. *Railway Co. v. Alling*, 99 U. S. 463. Where, on an appeal by the city of New Orleans from a decree in favor of a railway company, the appellee moved, in the Supreme Court, for a dismissal of the appeal, on a stipulation for such dismissal, signed by the city attorney, pursuant to a compromise of the matter in dispute made with the city council; and the Board of Liquidation of the city debt of New Orleans resisted the motion, claiming that, pending the appeal, authority over the subject-matter had been transferred from the city council to that board, and that the compromise was invalid; and also moved for leave to prosecute the appeal in the name of the city,—it was held that the question presented was too important to be settled summarily on a motion, and it was ordered that the cause and motions be continued to the next term, and that the appeal be then dismissed unless the Board of Liquidation should begin and prosecute, in some court of competent jurisdiction, without unnecessary delay, an appropriate proceeding to set aside the compromise made with the city council. *City of New Orleans v. New Orleans*,

*M. & T. R. Co.*, 108 U. S. 15. In one case the Supreme Court refused, on motion of the attorney for the defendant in error, who claimed that he had a lien on the judgment for his costs, to docket a case which had been dismissed upon stipulation after a settlement between the parties, upon that ground. *Platt v. Jerome*, 19 How. 384.

<sup>37</sup> U. S. v. Griffith, 141 U. S. 212.

<sup>38</sup> U. S. v. Minn. & N. W. R. Co., 18 How. 241; *McGuire v. Commonwealth*, 8 Wall. 882. In such a case he is not entitled to have the order state that the dismissal is without prejudice, but it may state the fact that there has been no hearing upon the merits. *Donallan v. Tannage Patent Co. (C. C. A.)*, 79 Fed. R. 385. Where during the pendency of an appeal to the Supreme Court from the Court of Claims, the latter court grants a new trial, the appeal will be dismissed on motion of the appellant. *U. S. v. Young*, 94 U. S. 258; *Latham's Appeal*, 9 Wall. 145; *Deming's Appeal*, 10 Wall. 251; *U. S. v. Ayres*, 9 Wall. 608; *U. S. v. Crusell*, 12 Wall. 175; *Ex parte Russell*, 13 Wall. 664; *Ex parte U. S.*, 16 Wall. 699. An appeal will not usually be dismissed on motion of the appellant without the consent of the respondent, if the appellant intends to bring a new appeal; but when the Attorney-General averred that other questions not on the record were material and should be considered, leave to dismiss the appeal was granted. *U. S. v. Minn. & N. W. R. Co.*, 18 How. 241.

to withdraw an appearance whenever asked, without prejudice to all the rights of the adverse party.<sup>39</sup> After an appearance has been withdrawn, the defendant in error may have the plaintiff called and the suit dismissed, or open the record and pray for an affirmance.<sup>40</sup> An appeal or writ of error may be dismissed, even after argument, and on the court's own motion, upon proof that the controversy between the parties has been settled.<sup>41</sup> It is no ground for a dismissal of an appeal that the

<sup>39</sup> *McGuire v. Commonwealth*, 8 Wall. 882; *U. S. v. Yates*, 6 How. 605. But see *Farrar v. U. S.*, 8 Pet. 459.

<sup>40</sup> *McGuire v. Commonwealth*, 8 Wall. 882; S. C. Rule 16; C. C. A. Rule 22.

<sup>41</sup> *Little v. Bowers*, 134 U. S. 547; *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black, 419; *Am. Wood Paper Co. v. Heft*, 8 Wall. 888; *San Mateo County v. So. Pac. R. Co.*, 116 U. S. 138; *East Tenn., V. & G. R. Co. v. So. Tel. Co.*, 125 U. S. 695. Thus, where after a writ of error to a judgment upon an indictment a *nolle prosequi* was entered in the court below by order of the President of the United States, and a copy of the same was filed in the office of the clerk of the Supreme Court, that court on motion dismissed the case. *U. S. v. Phillips*, 6 Pet. 776. Where, in an action on county bonds, subsequently to the judgment the county settled with the bondholders by giving them new bonds bearing a less rate of interest, and destroying the old bonds, the writ of error was dismissed. *Dakota County v. Glidden*, 113 U. S. 222. Where, pending an appeal from a decree granting or denying an injunction against the collection of a tax, the taxes are paid voluntarily, *Little v. Bowers*, 134 U. S. 547; or deposited in a bank to the credit of the State under a statute which makes such a deposit the equivalent of payment, *California v. San Pablo & Tulare R. Co.*, 149 U. S. 308; or collected by

compulsory process, *Singer Mfg. Co. v. Wright*, 141 U. S. 696,—the appeal will be dismissed. Where the whole controversy except the question of costs has been settled, the appeal will be dismissed. *Washington M. Co. v. District of Columbia*, 137 U. S. 62; *Arnold v. Woolsey (C. C. A.)*, 54 Fed. R. 268. A writ of error was dismissed where pending the same the plaintiff in error voluntarily paid so much of the judgment as to reduce it below the jurisdictional amount. *Thorp v. Bonnifield*, 177 U. S. 15. Upon appeal from a Circuit Court to the Supreme Court, in a suit for the infringement of a patent, one of several appellants, plaintiffs below, cannot have the appeal dismissed, against the objection of the others, upon the ground that the Supreme Court of the State, in a suit between the same parties, has enjoined the appellants from making any claim against the appellee for the use of the patented invention. *Marsh v. Nichols*, 120 U. S. 598. But see *Kimball v. Kimball*, 174 U. S. 158. Where pending an appeal in a suit between two corporations a majority of the stock of the defendant appellant had been acquired by the parties in control of the plaintiff respondent, the Supreme Court reversed the decree without passing upon the merits and remanded the case for further proceeding in conformity with the law. *So. Spring H. G. Min. Co. v. Amador M. G. Min. Co.*, 145 U. S. 300. An appeal from a decree dismissing a



plaintiff in error or appellant has been paid voluntarily by the respondent a sum of money, or has accepted a transfer of property under the judgment or decree brought up for review,<sup>42</sup> at least where he appeals from a part of the decree which is entirely disconnected with that which directs the payment or conveyance. An appeal will be dismissed by the court when it is shown from affidavits filed on behalf of persons not parties to the suit, that the appeal is not conducted by parties having adverse interests, but is a collusive appeal taken for the purpose of obtaining a decision.<sup>43</sup> A motion to dismiss a writ of error or appeal upon the ground of want of jurisdiction, or, it seems, for any other ground except a failure to take the same in due time,<sup>44</sup> or a failure to perfect the same,<sup>45</sup> may be made at any time, even before the term to which the return should regularly be made.<sup>46</sup> With the motion to dismiss in the Supreme Court may be united a motion to affirm,

bill for an injunction may be dismissed when the act sought to be enjoined has been committed pending the appeal, and there has been no pecuniary damage in consequence to the appellant; for example, when the complainant prayed for an injunction against a proceeding connected with an election, and in that case the Supreme Court took judicial notice of the fact that the election had taken place. *Mills v. Green*, 159 U. S. 651. But see *Matter of Madden*, 148 N. Y. 136; *Matter of Goodman*, 146 N. Y. 284; *People ex rel. Press Pub. Co. v. Martin*, 72 Hun, 354; s. c., 142 N. Y. 228; *Matter of Cuddebeck*, 3 N. Y. App. Div. 103, 108.

<sup>42</sup> *Erwin v. Lowry*, 7 How. 172, 184. Where the Supreme Court of a State enjoined the collection of the judgment of the Supreme Court of the District of Columbia beyond a certain sum, it was held that the plaintiff was not estopped from prosecuting his writ of error to the Supreme Court of the United States by the fact that he had accepted that sum. *Embry v. Palmer*, 107 U. S. 3.

<sup>43</sup> *Cleveland v. Chamberlain*, 1

*Black*, 419; *Embry v. Palmer*, 107 U. S. 3; *Benner v. Hayes* (C. C. A.), 80 Fed. R. 953. Upon a motion to dismiss an appeal on the ground that the controversy is fictitious, where the evidence leaves the question doubtful, the court will grant a rule to show cause why the suit should not be dismissed, with leave to both parties to take and file depositions in support of and against the motion. *Am. Wood Paper Co. v. Heft*, 8 Wall. 883; *East Tenn., V. & G. R. Co. v. So. Tel. Co.*, 125 U. S. 695.

<sup>44</sup> Such a motion must be reasonably made. *Bryar v. Campbell*, 177 U. S. 649.

<sup>45</sup> *Supra*, §§ 509, 511.

<sup>46</sup> *Ex parte Russell*, 13 Wall. 664; *Clark v. Hancock*, 94 U. S. 493; *Thomas v. Wooldridge*, 23 Wall. 283; *Whitney v. Cook*, 99 U. S. 607; *Whitcomb v. Smithson*, 175 U. S. 635; *Sugg v. Thornton*, 132 U. S. 524; *supra*, note 2; *Hook v. Mercantile Tr. Co.* (C. C. A.), 95 Fed. R. 41. Laches is no ground for denying a motion to dismiss because of a settlement of the controversy. *Little v. Bowers*, 134 U. S. 547.

on the ground that although the record may show that the Supreme Court has jurisdiction it is manifest that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.<sup>47</sup> Such a motion will not be granted unless there is a colorable ground for the motion to dismiss,<sup>48</sup> except in a case where the appeal is clearly frivolous.<sup>49</sup> It seems that such a motion may not be granted if united with a motion to dismiss for a defect in the bond.<sup>50</sup> The motion to affirm may be united with a motion to dismiss for a defect in the form of a writ of error, although it is usually coupled with a motion to dismiss for want of jurisdiction.<sup>51</sup>

The motion, like all other motions in the Supreme Court, must be reduced to writing, and contain a brief statement of the facts and objects of the motion.<sup>52</sup> It is the safer and the usual practice for the moving party to print the transcript before the submission of the motion, unless it has been previously printed by his adversary. The motion papers should contain so much of the record as to enable the court to act understandingly.<sup>53</sup> The motion day in the Supreme Court is Monday throughout the term.<sup>54</sup> No motion to dismiss, except on special assignment by the court, will be heard, unless previous notice has been given to the adverse party, or his counsel or attorney.<sup>55</sup> The party moving to dismiss must serve notice of the motion, with a copy of his brief or argument, on the counsel for his opponent in the Supreme Court at least three weeks before the time fixed for submitting the motion, in all cases except where such counsel resides west of the Rocky

<sup>47</sup> S. C. Rule 6; *Whitney v. Cook*, 99 U. S. 607; *Hinckley v. Morton*, 103 U. S. 764; *Micas v. Williams*, 104 U. S. 556; *Swope v. Leffingwell*, 105 U. S. 8; *Chanute City v. Trader*, 132 U. S. 210.

<sup>48</sup> *School Dist. v. Hall*, 106 U. S. 428; *Hinckley v. Morton*, 103 U. S. 764; *Davies v. Corbin*, 113 U. S. 687; *Walsington v. Nevin*, 128 U. S. 578; *New Orleans v. Louisiana Const. Co.*, 129 U. S. 45; *The Alaska*, 130 U. S. 201.

<sup>49</sup> *Chanute City v. Trader*, 132 U. S.

210; *The S. C. Tyron*, 105 U. S. 267; *Swope v. Leffingwell*, 105 U. S. 8; *Sugg v. Thornton*, 132 U. S. 524. But see *Amory v. Amory*, 91 U. S. 856.

<sup>50</sup> *Gay v. Parpart*, 101 U. S. 391.

<sup>51</sup> *Evans v. Brown*, 109 U. S. 180.

<sup>52</sup> S. C. Rule 6.

<sup>53</sup> *Texas Land & Cattle Co. v. Scott*, 137 U. S. 436; *Waterville v. Van Slyke*, 115 U. 290; *Meyer v. Walsh*, 108 U. S. 17.

<sup>54</sup> S. C. Rule 6.

<sup>55</sup> S. C. Rule 6.

Mountains, when the notice must be at least thirty days.<sup>56</sup> Affidavits of the deposit in the mail of the notice and brief, properly addressed to the counsel to be served, duly postpaid, in time to reach him by due course of mail, three weeks or thirty days, as the case may be, before the time fixed by the notice, is *prima facie* evidence of service on counsel who reside without the District of Columbia.<sup>57</sup> Further time may, however, be given either party by the court.<sup>58</sup> The motion, if not a motion to docket and dismiss for failure to file the record, must, in the first instance, be submitted on printed briefs and arguments.<sup>59</sup> If the court requires further argument on the subject, it will usually be ordered in connection with the argument of the case on the merits.<sup>60</sup> The motion to affirm, if made before the record is printed, will rarely be granted unless the motion papers which must be printed are very full, and clearly show the frivolous character of the appeal or error.<sup>61</sup> Affidavits may be used in support of the motion in a proper case.<sup>62</sup> Where the question is doubtful or the examination of a bulky record is required, it is usual to postpone the decision till the argument of the whole case.<sup>63</sup> After one motion to dismiss has been filed and set down for a hearing, the party that filed it has no right to file a second motion to dismiss upon new grounds without leave of the court.<sup>64</sup> Such leave will not be granted upon formal grounds only.<sup>65</sup> If the appeal is wholly insufficient to sustain the jurisdiction of the appellate court, that court may of its own motion, at the hearing on the merits, have notice of the insufficiency.<sup>66</sup> After the dismissal of a writ of error or appeal, the court may, but rarely will, reinstate the same upon a motion made at the same term at which the order of dismissal was entered.<sup>67</sup> The allowance

<sup>56</sup> S. C. Rule 6.

<sup>57</sup> S. C. Rule 6.

<sup>58</sup> S. C. Rule 6.

<sup>59</sup> S. C. Rule 6.

<sup>60</sup> S. C. Rule 6.

<sup>61</sup> *Crane Iron Co. v. Hoagland*, 108 U. S. 6; *Carey v. Houston & T. C. Ry. Co.*, 150 U. S. 170; *The Colonel McLeod*, 112 U. S. 710.

<sup>62</sup> *Rector v. Lipscomb*, 141 U. S. 557; *Whiteside v. Hazleton*, 110 U. S. 296; *supra*, § 504. For a case where

the court held it improper to file copies of certain letters, see *U. S. v. Griffith*, 141 U. S. 212.

<sup>63</sup> *Standard Oil Co. v. Bell (C. C. A.)*, 82 Fed. R. 113.

<sup>64</sup> *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 51 Fed. R. 929, 931, per Gray, J.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Bank of U. S. v. Swan*, 3 Pet. 68; *Glenny v. Langdon*, 94 U. S. 604;

of such an order rests in the discretion of the appellate court.<sup>68</sup> A motion to reinstate the cause must be made at the term at which the order of dismissal was entered.<sup>69</sup> Long delay may be a ground for denying such a motion, even though the motion is made at the term at which the order of dismissal was entered.<sup>70</sup> Such a motion may be granted, where the notice of the motion to dismiss was insufficient and irregular, since it designated no time for hearing;<sup>71</sup> where the omission to return the citation arose from the neglect of the court below, and the citation has been lost or destroyed;<sup>72</sup> where the trustee in bankruptcy applies to have a case reinstated which was dismissed, and to be substituted for the bankrupt as plaintiff in error, if he applies at the same term;<sup>73</sup> where an appeal has been dismissed for the failure of the appellant to file a transcript within the time required by the rule of the court, provided that the transcript is filed during the term.<sup>74</sup>

**§ 513. Printing the record.**—The record must be printed for the use of the court and counsel. The following rule regulates printing the record in the Supreme Court:—

“1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf. 2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket,

Knox v. Exchange Bank, 12 Wall. 379; *Alviso v. U. S.*, 6 Wall. 457.

<sup>68</sup> *Gwin v. Breedlove*, 15 Pet. 284; *James v. McCormack*, 105 U. S. 265.

<sup>69</sup> *Rice v. Minn. & N. W. R. Co.*, 21 How. 82; *Selma & M. R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253. But see *Jackson v. Ashton*, 10 Pet. 480.

<sup>70</sup> *Johnson v. Wilkins*, 118 U. S. 328; *Deming's Appeal*, 110 Wall. 251.

<sup>71</sup> *Glenny v. Langdon*, 94 U. S. 604.

<sup>72</sup> *Alviso v. U. S.*, 6 Wall. 457.

<sup>73</sup> *Knox v. Exchange Bank*, 12 Wall. 379.

<sup>74</sup> *Bank of U. S. v. Swan*, 3 Pet. 68; *West Chicago St. R. Co. v. Ellsworth (C. C. A.)*, 77 Fed. R. 664. But see Rule 8 as amended, 137 U. S. 710.

after March 1, 1884, the case shall be dismissed. 3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel. 4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction. 5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties. 6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel. 7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process. . . . 9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing filed with the clerk additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court

to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.”<sup>1</sup>

The following rule regulates printing the record in the Circuit Courts of Appeal: “The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.”<sup>2</sup>

Under special circumstances the expense of printing the record on appeal or in the court below may be paid from funds in the hands of a receiver;<sup>3</sup> and the record for the court below may be thus printed in such a manner as to be used in the appellate court should an appeal be subsequently taken by either party.<sup>4</sup>

All briefs and records for the use of the court must be printed in such form and size that they can be conveniently cut and bound so as to make an ordinary octavo volume.<sup>5</sup>

**§ 514. Argument of appeals and writs of error.**—All cases in the Supreme Court may, by consent of counsel, be submitted on printed arguments, within the first ninety days of the term, without regard to the number of the case on the docket, and

§ 518. <sup>1</sup> S. C. Rule 10; *De Groot v. Fourth Circuit*, forty; in the Fifth, U. S., 5 Wall. 419. Costs were enforced in *Ball & Locket Fastener Co. v. Kraetzer*, 150 U. S. 11. *Sixth and Seventh Circuits*, twenty-five. See *infra*, Appendix.

<sup>2</sup> C. C. A. Rule 23. By subsequent amendments in the First Circuit twenty-five copies were required; in the Second Circuit, fifteen; in the <sup>3</sup> *Ferguson v. Dent*, 46 Fed. R. 88. <sup>4</sup> *Dent v. Ferguson*, 131 U. S. 397; *Ferguson v. Dent*, 46 Fed. R. 88; *supra*, § 331.

<sup>5</sup> S. C. Rule 31; C. C. A. Rule 26.



appeals from the Court of Claims may be thus submitted within thirty days after they are docketed, but not in the midst of any term after the first of April.<sup>1</sup> In each case of such submission twenty-five copies of the arguments, signed by attorneys or counselors of the Supreme Court, must first be filed.<sup>2</sup> Where parties stipulate to submit a case without any mention of the time of submission, or any reference to the rule just cited, the court will not compel a submission before the case is called for argument in its regular place on the calendar.<sup>3</sup> No case can be submitted or taken up for argument within three days before the day fixed for an adjournment.<sup>4</sup> Such a stipulation cannot be withdrawn except by leave of the court for cause shown.<sup>5</sup> Ten cases only, including the one under argument, are called each day in the Supreme Court; but on the coming in of the court the entire number of such ten cases are called with a view to the disposition of such of them as are not to be argued.<sup>6</sup>

§ 514. <sup>1</sup>S. C. Rule 20, as amended 123 U. S. 759.

<sup>2</sup>S. C. Rule 20, as amended 123 U. S. 759.

<sup>3</sup>Glen v. Fant, 124 U. S. 123.

<sup>4</sup>S. C. Rule 27.

<sup>5</sup>Muller v. Dows, 94 U. S. 277. Where, after such a stipulation had been made, at the time appointed for the submission no argument was filed by the plaintiff in error, the court treated the cause as submitted, and affirmed the judgment without passing specially upon the assignments of error returned with the record; but subsequently rescinded the order of affirmance on condition that the plaintiff should pay the costs of the term and print the record within sixty days. *Aurrecoechea v. Bangs*, 110 U. S. 217. Where a number of causes were pending against different defendants who relied upon a common ground of defense, united in the employment of counsel, and contributed to a common fund for the expense of litigation; the Supreme Court refused to accept the submission of one of

the causes, which it was claimed had been amicably arranged under the employment of new counsel for the defense, when the original counsel employed for the general defense, who still retained the subsequent case, objected to such a submission. *Smelting Co. v. Kemp*, 103 U. S. 666. Where a cause which had been submitted on briefs involved a constitutional question upon which there was a difference of opinion in the Supreme Court, the submission was set aside, the cause restored to the calendar, and an oral argument ordered. *Louisiana v. New Orleans*, 103 U. S. 521. Where a cause was submitted under a stipulation, but the brief did not comply with that provision of Rule 21 which provides that "when a statute of a State is cited, it shall be printed at length," the submission was set aside, and the cause restored to its place on the docket. *School District v. Insurance Co.*, 101 U. S. 472.

<sup>6</sup>S. C. Rule 26. For the practice in the Circuit Courts of Appeals, see their rules in the Appendix, *infra*.

Cases brought to the Supreme Court "by writ of error or appeal, under the Act of February 25, 1889, chapter 236, or under section 5 of the Act of March 3, 1891, chapter 517, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals."<sup>7</sup> Writs of error to revise the judgments of State courts in criminal cases take precedence on the calendar, unless the Supreme Court otherwise directs.<sup>8</sup> Writs of error to judgments of conviction of capital crimes in the courts of the United States must be advanced to a speedy hearing on motion of either party.<sup>9</sup> Other criminal cases may be advanced by leave of the court on motion of either party.<sup>10</sup> Where a State is a party, or the execution of the revenue laws of a State is enjoined or stayed, such State or the party claiming under the revenue laws of a State, the execution whereof is stayed, is entitled on showing sufficient reason to have the cause heard at any time after it is docketed, in preference to any civil causes pending in the court between private parties.<sup>11</sup> Such a case will not be advanced at the motion of the party opposing the State, or seeking to enjoin the execution of its revenue laws.<sup>12</sup> Cases once adjudicated by the Supreme Court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.<sup>13</sup> Appeals from decisions of the Circuit Courts reviewing decisions of the Board of General Appraisers have a priority.<sup>14</sup> Revenue cases and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may, by leave of the court, be advanced on motion of the Attorney-General.<sup>15</sup> The court may advance any other cause under special and peculiar circumstances.<sup>16</sup> Two or more cases involving the same question may be argued together by leave of the court;<sup>17</sup> provided, at least, that both parties con-

<sup>7</sup> S. C. Rule 82, as amended November 28, 1892, 146 U. S. 707.

<sup>8</sup> U. S. R. S., § 710.

<sup>9</sup> 25 St. at L., ch. 113, § 6, p. 656.

<sup>10</sup> S. C. Rule 26.

<sup>11</sup> U. S. R. S., § 949. See *supra*, § 298.

<sup>12</sup> *Central R. Co. v. Bourbon County*, 116 U. S. 538.

<sup>13</sup> S. C. Rule 26.

<sup>14</sup> 26 St. at L. 138, § 15.

<sup>15</sup> S. C. Rule 26.

<sup>16</sup> S. C. Rule 26. But see *Poindexter v. Greenhow*, 109 U. S. 63. An appeal from part of an order will rarely, if ever, be heard before the rest of the appeal taken. *U. S. v. Lee Yen Tai* (C. C. A.), 108 Fed. R. 950.

<sup>17</sup> S. C. Rule 26.

sent thereto.<sup>18</sup> Permission may be given to a counsel to submit a brief in a case involving a question that is in the case in which he is retained. All motions to advance causes must be printed, and contain a brief statement of the matter involved, with the reasons for the application.<sup>19</sup> The calendar practice of the Circuit Courts of Appeals differs in the different circuits.<sup>20</sup> Special rules provide for a summary disposition of petitions for the revision of orders in bankruptcy.<sup>21</sup>

The Supreme Court has the following calendar practice: No stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court.<sup>22</sup> A cause can only be so passed upon application made and leave granted in open court.<sup>23</sup> If either party is ready when a case is called for argument, it is heard.<sup>24</sup> Otherwise, the case goes to the foot of the docket, unless some good and satisfactory reason to the contrary is shown to the court.<sup>25</sup> A case thus sent to the foot of the docket, if not again reached during the term, is continued to the next term.<sup>26</sup> When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, the case will be dismissed at the costs of the plaintiff unless sufficient cause for a postponement is shown.<sup>27</sup> After a case has been passed without going to the foot of the docket, on the written request of both parties the clerk will place it on the calendar ten cases after the case under argument, or next to be called at the end of the day the request is filed.<sup>28</sup> If the parties do not join in such a request, either may move to take up the cause, and it will then be assigned to such place on the docket as the court directs.<sup>29</sup> The Supreme Court may postpone the argument of an important constitutional question when the bench is not full.<sup>30</sup>

In the Supreme Court the counsel for the plaintiff in error or appellant must file with the clerk, at least six days before the case is called for argument, twenty-five copies of a printed

<sup>18</sup> S. C. Rule 26.

<sup>19</sup> S. C. Rule 26.

<sup>20</sup> See the rules in the Appendix, *infra*.

<sup>21</sup> *Ibid*.

<sup>22</sup> S. C. Rule 26.

<sup>23</sup> S. C. Rule 26.

<sup>24</sup> S. C. Rule 26.

<sup>25</sup> S. C. Rule 26.

<sup>26</sup> S. C. Rule 26; C. C. A. Rule 17.

<sup>27</sup> S. C. Rule 19.

<sup>28</sup> S. C. Rule 26.

<sup>29</sup> S. C. Rule 26.

<sup>30</sup> *Mayor of N. Y. v. Miln*, 9 Pet. 85; *Briscoe v. Commonwealth Bank*, 9 Pet. 85.

brief, one of which must, on application, be furnished to each of the counsel on the opposite side.<sup>31</sup> This brief must contain, in the order here stated:—“(1) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised. (2) A specification of the errors relied upon, which, in cases brought up by writ of error, must set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification must state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or rejection of evidence, the specification must quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification must set out the part referred to *in totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification must state the exception to the report and the action of the court upon it. (3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to pages of the record, and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case must be printed at length.”<sup>32</sup> The counsel for a defendant in error or an appellee must file with the clerk twenty-five printed copies of his argument at least three days before the case is called for hearing. His brief must be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors is required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.<sup>33</sup> The same practice prevails in this respect in the Circuit Courts of Appeals, except that the time of filing briefs and the number of copies varies in the different circuits.<sup>34</sup> Where a brief contains scandalous matter irrelevant to the questions raised by the writ of error or appeal, and the case has been dismissed, the brief may be stricken from the file.<sup>35</sup> Where there is no assignment of errors, as required by the

<sup>31</sup> S. C. Rule 21.

<sup>32</sup> S. C. Rule 21.

<sup>33</sup> S. C. Rule 21.

<sup>34</sup> See Appendix, *infra*.

<sup>35</sup> *Green v. Elbert*, 137 U. S. 615.

Revised Statutes and rules of the appellate courts,<sup>36</sup> counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.<sup>37</sup> The appellate court will take notice of a question affecting the jurisdiction, although not specified in the assignment of errors, and in such a case may direct that briefs be filed on that point.<sup>38</sup>

When according to these rules a plaintiff in error or appellant is in default, the case may be dismissed on motion;<sup>39</sup> and when an appellee or a defendant in error is in default under this rule, he will not be heard except on his adversary's con-

<sup>36</sup> See § 406; U. S. R. S., § 997, and S. C. Rule 35.

<sup>37</sup> S. C. Rule 21; C. C. A. Rules 11, 24; *Treat v. Jemison*, 20 Wall. 652; *Ryan v. Koch*, 17 Wall. 19; *Boston M. Co. v. Eagle M. Co.*, 115 U. S. 221; *Hunt v. Blackburn*, 127 U. S. 774; *Stevenson v. Barbour*, 140 U. S. 48. The following assignment of an error was held sufficiently specific: "The court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment, deciding that the time commenced to run from the day when the commissioners met and viewed the land, and not from the date of the return of the assessment." *Clinton v. Missouri Pac. Ry. Co.*, 122 U. S. 469. The following assignments of error have been held too vague and indefinite to be considered: (1) "The court erred in admitting any evidence in the case." (2) "The court erred in submitting the case to the jury, and entering up a judgment upon the verdict." (3) "The court erred in refusing to sustain the demurrer to the evidence offered by the plaintiff in error." (4) "The court erred in overruling the motion for a new trial asked by plaintiff in error." (5) "The court erred in overruling the motion in arrest of judgment

asked by plaintiff in error." (6) "The court erred in entering up judgment recognizing and enforcing a mechanic's lien." (7) "The court erred in construing 'Exhibit A' (which is letter of Van Stone to Schupp, found at page 76 of printed record) to be a waiver of the time in which the mill was to be completed." (8) "The court erred in overruling the demurrer to the evidence." *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128. See also *Stevenson v. Barbour*, 140 U. S. 48; *Branch v. Texas Lumber Mfg. Co. (C. C. A.)*, 53 Fed. R. 849; *City of Lincoln v. Sun V. St. L. Co.*, 59 Fed. R. 756; *Rowe v. Phelps*, 152 U. S. 87; *Lloyd v. Chapman (C. C. A.)*, 93 Fed. R. 599; *Ry. Officials & Emp. Acc. Ass'n v. Wilson (C. C. A.)*, 100 Fed. R. 368; the cases cited *supra*, §§ 507, 511, and a valuable note in 90 Fed. R. cxlvi, cliii. The specification of errors in the brief should conform substantially to the assignment of errors in the record. *Vider v. O'Brien (C. C. A.)*, 62 Fed. R. 326. As to setting forth the evidence in the specifications, see *Haldane v. U. S. (C. C. A.)*, 69 Fed. R. 819. As to the references to the record, see *Nat. Cash Reg. Co. v. Leland (C. C. A.)*, 94 Fed. R. 502.

<sup>38</sup> *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 116 U. S. 472.

<sup>39</sup> S. C. Rule 21; C. C. A. Rules 11, 24.

sent and at the request of the court.<sup>40</sup> No printed argument will be received after the oral argument begins or after a case has been submitted, except upon leave granted in open court after notice to opposing counsel.<sup>41</sup> When there is no appearance for the plaintiff in error when the case is called for argument, the defendant may have him called and have the writ of error or appeal dismissed, or may open the record and pray for an affirmance.<sup>42</sup> A motion to set aside a judgment for affirmance for a default, which would otherwise be excused, will be denied if it appears that the judgment must be affirmed on the merits.<sup>43</sup> When the defendant in error then fails to appear, the court may proceed to hear argument on the part of the plaintiff, and give judgment according to the right of the cause.<sup>44</sup> When a case is reached and no appearance is entered for either party, the case is dismissed at the cost of the plaintiff.<sup>45</sup> A printed argument filed on behalf of either party is equivalent to an appearance on his behalf.<sup>46</sup> In the Supreme Court when no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.<sup>47</sup> Otherwise, each party is entitled to be heard by two counsel and no more, except by leave of the court.<sup>48</sup> Two hours on each side is allowed on the argument of an appeal or writ of error, and one hour on the argument of a motion.<sup>49</sup> By leave of the court granted before the argument begins more time may be allowed.<sup>50</sup> The time may be apportioned between counsel on each side at their discretion; but a fair opening of the case must be made by the party having the opening and closing arguments.<sup>51</sup> The plaintiff in error or appellant is entitled to open and conclude the case.<sup>52</sup> Where there are cross-appeals, they are argued together as one case, and the plaintiff below has the right to open and conclude the argument.<sup>53</sup> No per-

<sup>40</sup> S. C. Rule 21; C. C. A. Rules 11, 24.

<sup>41</sup> S. C. Rule 20.

<sup>42</sup> S. C. Rule 16; *Hunt v. Blackburn*, 127 U. S. 774; *Stevenson v. Barbour*, 140 U. S. 48; *Boston M. Co. v. Eagle M. Co.*, 115 U. S. 221.

<sup>43</sup> *Treat v. Jemison*, 131 U. S. cxxxv.

<sup>44</sup> S. C. Rule 17.

<sup>45</sup> S. C. Rule 18.

<sup>46</sup> S. C. Rule 20.

<sup>47</sup> S. C. Rule 21 as amended Decem-

ber 11, 1893, 150 U. S. 713; C. C. A. Rule 24.

<sup>48</sup> S. C. Rule 21; C. C. A. Rules 24, 25.

<sup>49</sup> S. C. Rules 22 and 6; C. C. A. Rules 25 and 21.

<sup>50</sup> S. C. Rule 22; C. C. A. Rule 25.

<sup>51</sup> S. C. Rule 22; C. C. A. Rule 25.

<sup>52</sup> S. C. Rule 22; C. C. A. Rule 25.

<sup>53</sup> S. C. Rule 22; C. C. A. Rule 25; *L. Bucki & Son L. Co. v. Atl. Lumber Co.* (C. C. A.), 93 Fed. R. 765.



sons not appearing in the record have the right to be heard on an appeal or writ of error,<sup>54</sup> but the trustee of a bankrupt may be heard, as well as the bankrupt, on a writ of error brought by the bankrupt of which the trustee is entitled to the benefit.<sup>55</sup> Where two cases involve the same question the appellate court may direct that they be argued together.<sup>56</sup> In a case in which the United States are parties, the court will rarely hear counsel employed by another executive department in opposition to the Attorney-General or his representative.<sup>57</sup> Appellees who have perfected no cross-appeal cannot be heard except in support of the decree below.<sup>58</sup> Where a board of county commissioners alone brought a writ of error to an order for a mandamus against them and the clerk and treasurer of the county, who did not join in the writ, the board was not allowed to allege an error affecting the clerk and treasurer, but not the board.<sup>59</sup> The appellate court may refuse to hear argument in support of a writ of error in a criminal case where the plaintiff in error has put himself beyond the reach of process of the court below.<sup>60</sup> On an appeal from an order upon a petition for the writ of *habeas corpus*, where the petitioner had in pursuance of the order been placed without the jurisdiction of the court and of the United States, the Supreme Court dismissed the writ without an examination into its merits.<sup>61</sup> "No justice or judge before whom a cause or question shall have been tried or heard in a Circuit or District Court shall sit in the trial or hearing of such cause or question in the Circuit Court of Appeals."<sup>62</sup>

§ 515. Rehearings.—No rehearing or reargument will be allowed when not applied for till after the term at which a cause is decided, unless by special leave of the court granted

<sup>54</sup> *Harrison v. Nixon*, 8 Pet. 483; *U. S. v. Patterson*, 15 How. 10; *The Mabey*, 10 Wall. 419; *The William Bagley v. U. S.*, 5 Wall. 377.

<sup>55</sup> *Hill v. Harding*, 107 U. S. 631.

<sup>56</sup> *Ableman v. Booth*, 18 How. 479.

<sup>57</sup> *The Gray Jacket*, 5 Wall. 370.

<sup>58</sup> *The Slavers*, 2 Wall. 383; *The Stephen Morgan*, 94 U. S. 599; *Loudon v. Taxing Dist. of Shelby County*, 104 U. S. 771; *Gage v. Pumpelly*, 115 U. S. 454.

<sup>59</sup> *Cherokee County Com'rs v. Wilson*, 109 U. S. 621. See *Indiana So. R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 168.

<sup>60</sup> *Smith v. U. S.*, 94 U. S. 97.

<sup>61</sup> *Cheiong Al Moy v. U. S.*, 113 U. S. 216.

<sup>62</sup> 26 St. at L. 826, § 4; *Am. Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U. S. 372; *Morgan v. Dillingham*, 174 U. S. 153.

during the term.<sup>1</sup> Nor, at least in an equity case, after the cause has been remitted to the court below,<sup>2</sup> unless the mandate has been recalled.<sup>3</sup> Where the rule required mandates to be retained a specified time after the decision, it was held that a motion for a reargument would not be entertained after that time; unless it was shown that counsel were not notified of the decision or that the grounds of the motion could not have been easily ascertained within the time.<sup>4</sup> Nor, after the decision of any case, unless a justice who concurred in the decision moves for a rehearing, even if the court were equally divided;<sup>5</sup> and not then unless the proposition receives the support of a majority of the court.<sup>6</sup> The proper practice for a party who desires a rehearing in the Supreme Court is to submit without argument a brief printed petition or suggestion of the points thought important, which must be supported by the certificate of counsel that in his opinion the petition is well founded and is not made for the purpose of delay.<sup>7</sup> If upon such petitioner's suggestion, any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered.<sup>8</sup> Otherwise the motion will be denied as of course.<sup>9</sup> No reply to the application is allowed to the other side; nor does the court usually write an opinion when the pe-

§ 515. <sup>1</sup>Hudson v. Guestier, 7 Cranch, 1; Bushnell v. Crooke Min. & Sm. Co., 150 U. S. 82; Williams v. Conger, 131 U. S. 390; S. C. Rule 30; C. C. A. Rule 29.

<sup>2</sup>Browder v. McArthur, 7 Wheat. 58; Sibbald v. U. S., 12 Pet. 488; Washington Bridge Co. v. Stewart, 3 How. 413; Peck v. Sanderson, 18 How. 42.

<sup>3</sup>Killian v. Ebbinghaus, 111 U. S. 798; Ex parte Crenshaw, 15 Pet. 119; U. S. v. Gomez, 23 How. 326.

<sup>4</sup>Crabtree v. McCurtain (C. C. A.), 66 Fed. R. 1.

<sup>5</sup>Brown v. Aspden, 14 How. 25; U. S. v. Knight, 1 Black, 488; Public Schools v. Walker, 9 Wall. 603; Shreveport v. Holmes, 125 U. S. 694; S. C. Rule 30; C. C. A. Rule 29.

<sup>6</sup>Ambler v. Whipple, 23 Wall. 278. Very rarely then unless an important constitutional question is in-

volved. Shreveport v. Holmes, 125 U. S. 694.

<sup>7</sup>S. C. Rule 30; C. C. A. Rule 29; Hinds v. Keith (C. C. A.), 57 Fed. R. 10; U. S. v. The Dago (C. C. A.), 63 Fed. R. 182; Gregory v. Pike (C. C. A.), 67 Fed. R. 837; *supra*, § 352. For a form, see New Orleans v. Walker, 176 U. S. 92.

<sup>8</sup>Public Schools v. Walker, 9 Wall. 603.

<sup>9</sup>Ibid.

<sup>10</sup>Ambler v. Whipple, 23 Wall. 278. If the hearing in the appellate court was on an imperfect record, and a large part of the material evidence which was before the court below was omitted from the transcript, and there was no laches on the part of the appellee in failing to examine and perfect the record before the hearing, a strong case for a reargument is presented. Ambler v. Whip-

tition is denied.<sup>10</sup> It has been said that the effect of granting a rehearing is to make the cause stand as if no judgment had been entered in the court of review;<sup>11</sup> but an equal division of the court upon a rehearing of a judgment of reversal results in a reversal, not in an affirmance.<sup>12</sup>

**§ 516. Further proof on appeal.**—On an appeal in equity no new evidence can be taken either below or above for the consideration of the appellate court.<sup>1</sup> The same rule applies to proceedings on writs of error to review judgments at common law. On an appeal from a decree in admiralty in a prize case, further proof may be received by the order of the appellate court.<sup>2</sup> It is the practice of the Supreme Court in prize cases to hear the cause in the first instance upon the evidence transmitted from the court below; and then to decide upon that evidence whether it is proper to allow further proof.<sup>3</sup> An order for further proof is always made with extreme caution, and only where the ends of justice clearly require it.<sup>4</sup> Upon a

ple, 23 Wall. 278. A rehearing was granted on the ground that the decree brought up by the appeal was not the one recited in the prayer for an appeal, but one rendered subsequently thereto, and merely in execution of it; so that the parties might present all the questions which arose both on the original transcript and upon the transcript as corrected. *Chicago & V. R. Co. v. Fosdick*, 106 U. S. 47, 80. A rehearing was refused when the application was based on the ground that the record of another suit, the decree in which had not been pleaded and was not rendered upon the merits, should be embodied in the transcript. *Morgan County v. Allen*, 103 U. S. 515. A rehearing will ordinarily be refused when asked upon a theory inconsistent with the original argument and not then presented. *Merriman v. Chicago & E. L. R. Co.* (C. C. A.), 66 Fed. R. 663. A rehearing will not be granted merely because the case is one of importance. *Camfield v. U. S.* (C. C. A.), 66 Fed. R. 101. And very

rarely by a Circuit Court of Appeals in a case where its decision is not final. *Texas & Pac. Ry. Co. v. Gentry* (C. C. A.), 57 Fed. R. 422. A rehearing will not be granted because the court misquoted testimony in its opinion, where such misquotation did not affect the result. *Torrent v. Duluth Lumber Co.*, 32 Fed. R. 229. A rehearing on appeal cannot be granted for newly discovered evidence. *Maxwell Land Grant Case*, 122 U. S. 365.

<sup>11</sup> *Hook v. Mercantile Tr. Co.* (C. C. A.), 95 Fed. R. 41.

<sup>12</sup> *Carmichael v. Eberle*, 177 U. S. 63. § 516. <sup>1</sup> *Holmes v. Trout*, 7 Pet. 171; *Mitchell v. U. S.*, 9 Pet. 711; *Pacific R. Co. of Mo. v. Ketchum*, 95 U. S. 1; *Boone v. Chiles*, 10 Pet. 177.

<sup>2</sup> *The Lady Pike*, 21 Wall. 1; *The Samuel*, 1 Wheat. 9; *The Mary*, 8 Cranch, 388; *The Adeline*, 9 Cranch, 244; *The Atalanta*, 3 Wheat. 409; *supra*, § 430.

<sup>3</sup> *The London Packet*, 2 Wheat. 371.

<sup>4</sup> *The Gray Jacket*, 5 Wall. 342.

motion for further proof in the appellate court, some excuse satisfactory to the court should be shown for the failure to offer the proof in the court below.<sup>5</sup> Where the evidence as it stood was not in the opinion of the court susceptible of any satisfactory explanation by the party desiring an order for further proof, the order was refused.<sup>6</sup>

Where the court looked into the further proof offered, and on comparing it with the evidence already in the case was of the opinion that it would be totally incompetent to make out a title in the party, his application for further proof was rejected.<sup>7</sup> The suppression of papers, where it appears to have been intentional and fraudulent and attended with other suspicious circumstances, is good cause for refusing further proof; but where the suppression appears to be owing to accident or mistake, and no other suspicious circumstances appear in the case, other proof may be allowed.<sup>8</sup> The claimant forfeits all right to offer further proof by a guilty concealment of the same in his first affidavit and claim.<sup>9</sup> Further proof will usually be ordered by the Supreme Court in a prize cause, where the national character and proprietary interest of goods recaptured do not distinctly appear.<sup>10</sup> Affidavits to be used as further proof in a prize cause are usually taken by commission.<sup>11</sup> On further proof the affidavit of the claimant is indispensably necessary.<sup>12</sup> Where affidavits were presented to show that the testimony of witnesses on which the decree was rendered was obtained by a corrupt agreement to pay them money, of which the appellant had no knowledge at the time of the trial, a commission was ordered to take the testimony of those witnesses.<sup>13</sup> Where an order for further proof is made, and the party disobeys the injunctions or neglects to comply with them, a court of prize will usually consider such neglect as contumacy, which leads to presumptions fatal to his claims.<sup>14</sup>

<sup>5</sup>The *Mabey*, 10 Wall. 419; The *Beeche Dene* (C. C. A.), 55 Fed. R. 526; *Red River Line v. Cheatham*, 60 Fed. R. 517; *In re Hawkins*, 147 U. S. 486; *supra*, § 480.

<sup>6</sup>The *Hazard v. Campbell*, 9 Cranch, 205.

<sup>7</sup>The *Euphrates*, 8 Cranch, 885.

<sup>8</sup>The *St. Lawrence*, 8 Cranch, 434;

The *Fortuna*, 2 Wheat. 161; The *Fortuna*, 3 Wheat. 236.

<sup>9</sup>The *Gray Jacket*, 5 Wall. 842.

<sup>10</sup>The *Adeline*, 9 Cranch, 244; The *Atalanta*, 8 Wheat. 409.

<sup>11</sup>The *London Packet*, 2 Wheat. 871.

<sup>12</sup>The *Venus*, 5 Wheat. 127.

<sup>13</sup>The *Western Metropolis*, 12 Wall. 389.

<sup>14</sup>The *La Nereyda*, 8 Wheat. 108.

Further proof cannot be admitted until the cause is heard, but where upon the opening it appears to be a case for further proof, further proof may be admitted immediately, unless it appears that the other party should be allowed to produce further proof also.<sup>15</sup> In a prize cause the captors are competent witnesses upon an order for further proof, where the benefit of it extended to both parties.<sup>16</sup> A second order for further proof may be made when the further proof furnished in obedience to the first order is not satisfactory.<sup>17</sup>

**§ 517. Decisions on writs of error and appeals.**—On proceedings upon a writ of error to a State Court the Supreme Court may reverse, modify, or affirm the judgment or decree below; and has discretionary power to award execution, or remand the case to the court to which the writ of error issued.<sup>1</sup> The Supreme Court may affirm, modify or reverse any judgment, decree or order of a Circuit Court or District Court, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require.<sup>2</sup> Neither the Supreme Court nor, it seems, a Circuit Court of Appeals has power to issue execution in a cause brought up from a Circuit or District Court, but must send a special mandate to the inferior court to award execution thereupon.<sup>3</sup> Whenever on appeal or writ of error, or otherwise, a case coming directly from a District Court or Circuit Court is reviewed or determined in the Supreme Court, the cause must be remanded to the proper District or Circuit Court, for further proceedings to be taken in pursuance of such determination.<sup>4</sup> Whenever on appeal or writ of error, or otherwise, a case coming from a Circuit Court of Appeals is reviewed and determined in the Supreme Court, the cause must be remanded to the proper District or Circuit Court for further proceedings in pursuance of such determination.<sup>5</sup> Whenever on appeal or writ of error, or otherwise, a case coming from a District or Circuit Court is reviewed and determined in a Cir-

<sup>15</sup> *The Venus*, 1 Wheat. 112.

<sup>16</sup> *The Anne*, 8 Wheat. 485.

<sup>17</sup> *The Frances*, 8 Cranch, 348.

§ 517. <sup>1</sup> U. S. R. S., § 709.

<sup>2</sup> U. S. R. S., § 701; 26 St. at L. 829, §§ 10, 11.

<sup>3</sup> U. S. R. S., § 701; 26 St. at L. 829, §§ 10, 11.

<sup>4</sup> 26 St. at L. 829, § 10.

<sup>5</sup> 26 St. at L. 829, § 10.

cuit Court of Appeals, in a case in which the decision of the Circuit Court of Appeals is final, the cause must be remanded to such District or Circuit Court for further proceedings to be taken in pursuance of such decision.<sup>6</sup> The same rules apply to the review by the Supreme Court of the final judgments and decrees of the Supreme Court of the District of Columbia, the Court of Claims, and the Court of Private Land Claims; and to the review by the Supreme Court and the Circuit Courts of Appeals of the final judgments and decrees of the Supreme Courts of the Territories, and of the United States court in the Indian Territory.<sup>7</sup>

Where the appellate court is equally divided, the judgment or decree of the court below is affirmed upon the point as to which there is a division.<sup>8</sup> In such a case the appellate court cannot change the decree of the court below in any respect; nor exercise any discretionary power to allow interest on the affirmance.<sup>9</sup> In case of a division, the appellate court will usually hand down no opinion;<sup>10</sup> and the decision is not to be considered as settling any principle.<sup>11</sup>

In general, the appellate court, when reversing a judgment at common law, will order a new trial,<sup>12</sup> and when reversing a decree in equity or admiralty, will direct the entry of a decree below, finally disposing of the matters in litigation.<sup>13</sup> A new hearing will not be ordered where evidence was erroneously admitted on a hearing in equity, or on a trial before a judge without a jury; but the appellate court will render such judgment in the case as may be proper.<sup>14</sup> Where a judgment or decree is reversed for want of jurisdiction, the appellate court

<sup>6</sup> 26 St. at L. 829, § 10.

<sup>7</sup> U. S. R. S., § 705; 26 St. at L. 829, 830, §§ 11, 13, 15.

<sup>8</sup> *The Antelope*, 10 Wheat. 66; *Washington Bridge Co. v. Stewart*, 3 How. 413; *Holmes v. Jennison*, 14 Pet. 540. But see *Carmichael v. Eberle*, 177 U. S. 63; *supra*, § 515.

<sup>9</sup> *Hemmenway v. Fisher*, 20 How. 255.

<sup>10</sup> *Benton v. Woolsey*, 12 Pet. 27.

<sup>11</sup> *Etting v. Bank of U. S.*, 11 Wheat. 59.

<sup>12</sup> *Hudson v. Guestier*, 6 Cranch, 281; *Exchange Nat. Bank v. Third*

*Nat. Bank*, 112 U. S. 276; *Little Miami & C. & X. R. Co. v. U. S.*, 108 U. S. 277.

<sup>13</sup> *Blease v. Garlington*, 92 U. S. 1; *Penhallow v. Doane*, 3 Dallas, 54; *Wickliffe v. Owings*, 17 How. 47. In an extraordinary case the Supreme Court reversed a decree without passing on the merits, with instructions to refer the case to a master to find upon a certain question. *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167.

<sup>14</sup> *Field v. U. S.*, 9 Pet. 182; *U. S. v. King*, 7 How. 833, 854.



will usually direct the entry of a judgment or decree of dismissal,<sup>15</sup> or in a case originally brought in a State court will direct a remand, even if it has been stipulated that the case shall abide the decision of another case.<sup>16</sup> Where all the facts have been determined by a special verdict, a case stated, or findings below, and the judgment is reversed because the judgment was not in conformity with them, the appellate court may direct final judgment to be entered in favor of the plaintiff in error without a new trial.<sup>17</sup> Or it may remit the case to the court below for an assessment of damages.<sup>18</sup> An appellate court cannot modify a judgment upon a verdict by reducing the amount of damages, and directing the entry of a judgment in favor of the defendant in error for the reduced amount of damages;<sup>19</sup> but where interest was erroneously allowed,<sup>20</sup> or erroneously computed,<sup>21</sup> the usual practice is not to reverse absolutely, but to direct that the judgment be reversed unless the defendant in error files in the court below a *remittitur* of the excessive interest and produces a certified copy of the same to the court below at the same term.<sup>22</sup> The Supreme Court of a Territory may enter an order directing that a judgment be reversed and a new trial had, unless the defendant in error stipulates to remit a specified portion of the damages, and that if he does so remit the judgment be affirmed.<sup>23</sup> If the pleadings

<sup>15</sup> *Bingham v. Cabbot*, 3 Dall. 19; *Grace v. Am. Cent. Ins. Co.*, 109 U. S. 278; *Börs v. Preston*, 111 U. S. 252. But where the objection was first taken upon the writ of error, and it appeared, although not by direct averment, that there was a diversity of citizenship between the parties, the case was remanded for appropriate action by the trial court with permission to grant leave to amend. *Hunt v. Howes* (C. C. A.), 74 Fed. R. 657. Cf. *Everhart v. Huntsville College*, 120 U. S. 223.

<sup>16</sup> *Ryder v. Holt*, 128 U. S. 525.

<sup>17</sup> *National Bank v. Insurance Co.*, 95 U. S. 673, 679; *Allen v. St. Louis Bank*, 120 U. S. 20; *Cleveland R. M. Co. v. Rhodes*, 121 U. S. 255; *Fort Scott v. Hickman*, 112 U. S. 150; *Graham v. Bayne*, 18 How. 60. Cf. *Walker v. Windsor Nat. Bank* (C. C.

A.), 56 Fed. R. 76. But see *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92; *Miller v. Houston City St. R. Co.* (C. C. A.), 55 Fed. R. 866; *Mundy v. Stevens* (C. C. A.), 61 Fed. R. 77, 86.

<sup>18</sup> *Fisher v. Newark City Ice Co.* (C. C. A.), 62 Fed. R. 569.

<sup>19</sup> *Kennon v. Gilmer*, 131 U. S. 22.

<sup>20</sup> *Washington & Georgetown R. Co. v. Harmon*, 147 U. S. 571, 590.

<sup>21</sup> *Gulf, C. & S. F. Ry. Co. v. Johnson* (C. C. A.), 54 Fed. R. 474, 481.

<sup>22</sup> *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 590; *Gulf, C. & S. F. Ry. Co. v. Johnson* (C. C. A.), 54 Fed. R. 474; *Hansen v. Boyd*, 161 U. S. 397, 411; *Koenigsberger v. R. S. Ins. Co.*, 158 U. S. 41, 53.

<sup>23</sup> *Hopkins v. Orr*, 124 U. S. 510; *Arkansas Val. L. & C. Co. v. Mann*, 130 U. S. 69.

and the verdict clearly afford the means of distinguishing the invalid part of the plaintiff's claim from the rest, the Supreme Court or the Circuit Court of Appeals may do the same;<sup>24</sup> but otherwise it seems that neither of these courts can reverse a judgment at common law upon a verdict because of excessive damages,<sup>25</sup> or because against the weight of evidence.<sup>26</sup>

A decree in equity may be affirmed in part and reversed in part.<sup>27</sup> Where a decree in equity is reversed for the refusal of the court below to permit leave to file an amended bill or other bill not original, a new hearing upon the new bill and the subsequent proceedings thereupon will be ordered below.<sup>28</sup> Where a decree has been rendered below against the plaintiff, and the appellate court is of the opinion that the facts show that he has an equitable title to some relief, although not to any relief upon the case made by the bill, the decree may be reversed, with a direction that the court below allow the plaintiff to amend, and that such other proceedings be had as may be consonant with justice.<sup>29</sup> Analogous relief may also be granted to a defendant appellant in a proper case.<sup>30</sup> The appellate court may also in such a case affirm in part the decree below, but send a mandate directing the inferior court to reopen its decree and allow further proceedings.<sup>31</sup> Where a decree is reversed for a denial to a party of an accounting, an accounting will be ordered below.<sup>32</sup> A new hearing below will not be ordered for the improper exclusion of evidence in a case in equity.<sup>33</sup>

<sup>24</sup> *Bank of Kentucky v. Ashley*, 2 Pet. 327. But see *Wilson v. Everett*, 139 U. S. 616.

<sup>25</sup> *Wilson v. Everett*, 139 U. S. 616; *Wabash R. Co. v. McDaniels*, 107 U. S. 454; *No. Pac. R. Co. v. Charles* (C. C. A.), 51 Fed. R. 562, 580; *Morning Journal Ass'n v. Rutherford* (C. C. A.), 51 Fed. R. 513, 516; *Hogg v. Emerson*, 11 How. 587. But see *Bank of Kentucky v. Ashley*, 2 Pet. 327.

<sup>26</sup> *Wilson v. Everett*, 139 U. S. 616; *N. Y., L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 75.

<sup>27</sup> *Elizabeth v. Am. N. P. Co.*, 131 U. S. cxlviii; *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89; s. c., 138 U. S. 509, 511.

<sup>28</sup> *Riddle v. Whitehill*, 135 U. S. 621, 640; *Ballard v. Searls*, 130 U. S. 50. In an extraordinary case leave to amend the pleading may be given by the appellate court. *Jones v. Meehan*, 175 U. S. 1.

<sup>29</sup> *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396; *Crocket v. Lee*, 7 Wheat. 522; *Watts v. Waddle*, 6 Pet. 389. This will rarely be done when the amendment would require new evidence. *Am. Bell Tel. Co. v. U. S. (C. C. A.)*, 68 Fed. R. 542.

<sup>30</sup> *Crocket v. Lee*, 7 Wheat. 522.

<sup>31</sup> *Watts v. Waddle*, 6 Pet. 389.

<sup>32</sup> *Chouteau v. Barlow*, 110 U. S. 238.

<sup>33</sup> *Blease v. Garlington*, 92 U. S. 1.

The excluded evidence in a case in equity must appear on the record, so that the appellate court, if it thinks it should have been admitted, may direct the entry below of such a decree as it shows to be proper.<sup>34</sup> The same rule applies to evidence taken by deposition,<sup>35</sup> but not to the exclusion of a question upon oral examination in a trial by jury at common law.<sup>36</sup>

Upon a writ of error or appeal, the appellate court will review any decision upon an interlocutory application appearing on the record, whereby the rights of the plaintiff in error or appellant were injuriously affected.<sup>37</sup> The fact that a prior appeal, which has been dismissed for a failure to perfect the same, or for some other reason, was taken from the interlocutory order or decree, does not prevent the same from being thus reviewed on appeal from the subsequent final decree,<sup>38</sup> unless such prior order or decree was in its nature final and

<sup>34</sup> Ibid.; *supra*, § 284.

<sup>35</sup> *Shauer v. Alerton*, 151 U. S. 607, 617.

<sup>36</sup> *Buckstaff v. Russell*, 151 U. S. 626.

<sup>37</sup> *Buckingham v. McLean*, 18 How. 150; *Riddle v. Whitehill*, 135 U. S. 621. See, however, *Gunn v. Black* (C. C. A.), 60 Fed. R. 151. The court will review upon an appeal from a final judgment or decree a decision on a plea of abatement to a writ of attachment. *Fitzpatrick v. Flannagan*, 106 U. S. 648. But see *Leitensdorfer v. Webb*, 20 How. 176. A decision denying a motion to remand seasonably made, on the ground that the petition for a removal was filed too late or because the case was not removable. *Edrington v. Jefferson*, 111 U. S. 770. In an extraordinary case a denial of leave to amend. *Riddle v. Whitehill*, 135 U. S. 621. But see *National Bank v. Carpenter*, 101 U. S. 567, 568; *Gormley v. Bunyan*, 138 U. S. 623, 634; *supra*, § 168. An error by the Court of Appeals of the District of Columbia in granting a motion for a new trial, on a writ of error to the final judgment after the second trial. *Coughlin v. District of*

*Columbia*, 106 U. S. 7. Cf. *Spalding v. Mason*, 161 U. S. 375. And an order fining a party for contempt, and directing that part of the fine be paid to the opposite party. *Werden v. Searls*, 121 U. S. 14, 26. See *supra*, § 344. Similarly, where the defendant after his demurrer had been overruled was allowed to answer by an order expressly reserving his objection thereto, the court considered the question upon a writ of error to the final judgment. *Bauserman v. Blunt*, 147 U. S. 647. But a court of review will not reverse a judgment for an error in ruling upon a plea in abatement other than a plea to the jurisdiction of the court. U. S. R. S., § 1011. See *Henderson v. Henshall* (C. C. A.), 54 Fed. R. 320, 330, and *supra*, § 496. An appellate court will not hold that the court below erred in the interpretation of its own order, unless it is clear that injustice resulted from the erroneous interpretation. *Girard L. Ins. Ass'n & Tr. Co. v. Cooper* (C. C. A.), 51 Fed. R. 332, 335.

<sup>38</sup> *Buckingham v. McLean*, 18 How. 150.

appealable.<sup>39</sup> An appeal from an order confirming a sale does not bring up for review a decree denying a motion to dismiss the bill.<sup>40</sup> A judgment or order on a collateral question arising on the suggestion of a party not on the record, who has himself sued out no writ of error, cannot be thus reviewed.<sup>41</sup> Upon an appeal from an order directing payment out of the proceeds of a foreclosure sale, the propriety of the orders made during the foreclosure is not considered.<sup>42</sup> Where a suit originally in equity was transferred by consent to the common-law side of the court below, a bill of exceptions does not bring up for revision proceedings prior to such transfer.<sup>43</sup> As a general rule, no judgment or decree will be reversed upon an objection not raised below.<sup>44</sup> A judgment or decree will be

<sup>39</sup> *Hill v. Chicago & E. R. Co.*, 140 U. S. 52. See *Porter v. Pittsburg B. S. Co.*, 120 U. S. 649; *supra*, §§ 318, 503.

<sup>40</sup> *Turner v. Farmers' L. & Tr. Co.*, 106 U. S. 552; *Long v. Maxwell* (C. C. A.), 59 Fed. R. 948.

<sup>41</sup> *Bayard v. Lombard*, 9 How. 580.

<sup>42</sup> *Central Tr. Co. v. Grant Locom. Works*, 135 U. S. 207.

<sup>43</sup> *Nations v. Johnson*, 24 How. 195.

<sup>44</sup> *Barrow v. Reab*, 9 How. 366; *Lathrop v. Judson*, 19 How. 66; *Ins. Co. of Va. Valley v. Mordecai*, 22 How. 111; *De Sobry v. Nicholson*, 8 Wall. 420; *Clements v. Moore*, 6 Wall. 299; *Tome v. Dubois*, *id.* 548; *The Georgia*, 7 Wall. 82; *Laber v. Cooper*, *id.* 565; *Alviso v. U. S.*, 8 Wall. 337; *The Eagle*, *id.* 15; *Express Co. v. Kountze*, *id.* 342; *Nat. Bank v. Kentucky*, 9 Wall. 853; *Rogers v. Bitter*, 12 Wall. 317; *Klein v. Russell*, 19 Wall. 433; *Wood County v. Lackawanna I. & C. Co.*, 93 U. S. 619; *Wheeler v. Sedgwick*, 94 U. S. 1; *Flournoy v. Lastrepe*, 131 U. S. clxi; *U. S. v. Morgan*, 131 U. S. clxiv; *Wilson v. McNamee*, 102 U. S. 572; *Springer v. U. S.*, *id.* 586; *Wood v. Weimar*, 104 U. S. 786; *Clark v. Fredericks*, 105 U. S. 4; *Morrill v. Jones*, 106 U. S. 466; *Union Pac. R. Co. v. Myers* (Pa-

cific R. R. Removal Cases), 115 U. S. 1. It is too late to object in the Supreme Court for the first time that an appeal below was heard at chambers, and not in open court. *Roberts v. Reilly*, 116 U. S. 80. It is too late to object in the appellate court for the first time that the action is improper in form, *Marine Bank v. Fulton Bank*, 2 Wall. 252; that the evidence shows usury, *Ewing v. Howard*, 7 Wall. 499; that there was a misnomer of the plaintiff, *Breedlove v. Nicolet*, 7 Pet. 413; that there was an insufficient replication, *Erskine v. Hohnbach*, 14 Wall. 613; or no replication, *Fretz v. Stover*, 22 Wall. 198; *Laber v. Cooper*, 7 Wall. 565; *Nauvoo v. Ritter*, 97 U. S. 389; *Central Nat. Bank of Baltimore v. Conn. Mutual Life Ins. Co.*, 104 U. S. 54, see *supra*, § 157, when the case was tried as if the issues were properly raised; that there was a defect in pleading which was cured by the verdict, *De Sobry v. Nicholson*, 8 Wall. 420; *Coffey v. U. S.*, 116 U. S. 436; or findings below, *The Vaughan and Telegraph*, 14 Wall. 258; that a fact in issue essential to the judgment was not proved, when, for all that appears, proof might have been offered had the objection been sea-

reversed for want of jurisdiction below, by the appellate court of its own motion, although the objection is not raised by the parties below or above.<sup>45</sup> Where the decision of the Federal court below was based upon a statute which had been repealed,

sonably made, *O'Reilly v. Campbell*, 116 U. S. 418; that a Mexican grant was fictitious, *U. S. v. Larkin*, 18 How. 557; that errors then excepted to were made on the trial of an issue directed by a court of equity, when the exceptions were not brought to the attention of the court of equity after the trial, *Brockett v. Brockett*, 8 How. 691; *McLaughlin v. Bank of Potomac*, 7 How. 220; that the proof varied from the pleadings, when the objections might have been obviated if taken below, *Roberts v. Graham*, 6 Wall. 578; that instructions to the jury were erroneous when no exception was taken to them at the time; *Castle v. Bullard*, 23 How. 172; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474; but the Circuit Court of Appeals for the Fifth Circuit reversed a judgment on a writ of error where the evidence did not justify a verdict for the plaintiff, although no direction of a verdict for the defendant was requested below, *Texas & P. Ry. Co. v. Patton*, 61 Fed. R. 259; that a deposition read in evidence without objection was taken too late, *Ray v. Smith*, 17 Wall. 411. A judgment will rarely be reversed for the admission of evidence against an objection and exception when the ground of the objection was not stated. *Ward v. Blake Mfg. Co.* (C. C. A.), 56 Fed. R. 437, 441; *U. S. v. Shapleigh* (C. C. A.), 54 Fed. R. 126; *No. Pac. R. Co. v. Charless* (C. C. A.), 51 Fed. R. 562; *Burton v. Driggs*, 20 Wall. 125. A judgment will not be reversed for the admission of evidence when no objection and exception was taken on the trial. *Hinde v. Longworth*, 11 Wheat. 199; *Pennock v. Dialogue*, 2 Pet. 1; *Nelson v.*

*Woodruff*, 1 Black, 156; *Cucullu v. Emmerling*, 23 How. 88. It was held that where the only question raised on the trial was whether certain cotton ties were subject to duty as "band iron" or as "manufactures of iron," the plaintiff in error could not claim in the appellate court for the first time that they belonged to another class subject to a different duty. *Badger v. Ranlett*, 106 U. S. 255. A judgment will not be reversed because the plaintiff has no legal capacity to sue when the point is raised for the first time on appeal. *St. Louis S. W. Ry. Co. v. Henson* (C. C. A.), 58 Fed. R. 531. The fact that the sufficiency of the evidence to support the verdict was passed upon by the court below on a motion for a new trial will not authorize a review of its action on a writ of error. *City of Lincoln v. Sun V. S. L. Co.* (C. C. A.), 59 Fed. R. 756. A verdict for defendants, when but one defendant appeared and defended, and the others were formal parties, was held to be a clerical error which was no ground for a reversal upon a writ of error, when no motion to correct it was made at the time. *Shattuck v. No. Br. L. & Mer. Ins. Co.* (C. C. A.), 58 Fed. R. 609.

<sup>45</sup> *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Bors v. Preston*, 111 U. S. 252; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 116 U. S. 472. The Supreme Court refused to reverse a judgment because the judge refused to allow a plea concerning the citizenship of the plaintiff to be filed during the trial. *Mexican C. Ry. Co. v. Pinkney*, 149 U. S. 194. In one case the Supreme Court refused to affirm a judgment "upon a jurisdic-

it will be reversed although the repeal was not brought to the attention of the inferior court.<sup>46</sup> Where an indispensable party to a suit in equity has been omitted, the decision may be reversed although the objection was not taken below.<sup>47</sup> An objection appearing upon the record at common law, which would have been fatal on a motion in arrest of judgment, or on a general demurrer, is equally fatal upon a writ of error although not raised below.<sup>48</sup> An appellant may claim relief upon a different theory from that on which he relied below, provided that the pleadings are sufficiently broad to support his contention.<sup>49</sup>

A law passed after a judgment in the inferior court, which changes the rule governing the case, if constitutional, must be

tional ground not passed upon by the Circuit Court," when of the opinion that the Circuit Court decided the case below upon an erroneous ground which might prejudice the plaintiff in error in subsequent litigation; and consequently reversed the judgment. *Scott v. Armstrong*, 146 U. S. 499, 512. In a late case the Supreme Court reversed the judgment because the case was tried below by both parties under a mutual mistake of law. *Murdock v. Ward*, 178 U. S. 139. Where the point was not taken below, the appellate court may refuse to order the dismissal of a bill because the plaintiff has an adequate remedy at law, *Wylie v. Coxe*, 15 How. 415; *Crosby v. Buchanan*, 28 Wall. 420; *Reynes v. Dumont*, 130 U. S. 354; *supra*, § 110; but it has the power in such a case to reverse a decree for that reason. *Lewis v. Cocks*, 28 Wall. 466; *Oelrichs v. Spain*, 15 Wall. 211; *Reynes v. Dumont*, 130 U. S. 354, 395; *Allen v. Pullman's P. C. Co.*, 139 U. S. 658.

<sup>46</sup> *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751.

<sup>47</sup> *Coiron v. Millaudon*, 19 How. 113; *Hoe v. Wilson*, 9 Wall. 501. See *supra*, §§ 53, 61.

<sup>48</sup> *Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How. 131; *Mo-*

*Allister v. Kuhn*, 96 U. S. 87; *Cragin v. Lovell*, 109 U. S. 194; *Coffey v. U. S.*, 116 U. S. 486. An omission to allege notice of protest in a declaration against an indorser, *Slacum v. Pomery*, 6 Cranch, 221; and sustaining plea of *non assumpsit* to a declaration in tort, *Garland v. Davis*, 4 How. 131, were held errors for which the respective judgments should be reversed, although the objection was in neither case raised below, and in the latter case was not raised by counsel for the plaintiff in error. Where there was a combination of errors of a grave character, including the filing of an amended bill after issue without leave of court; a reference to an auditor which was not revoked nor apparently terminated before the final decree; a failure to file a replication to either of the answers; and a petition "by way of cross-bill," naming no defendants, seeking no process, and upon which no process was issued, but upon which the final decree was based,—the Supreme Court reversed the decree although no objection on any of these grounds was raised below. *Washington R. Co. v. Bradleys*, 10 Wall. 299.

<sup>49</sup> *Wiggins Ferry Co. v. Ohio & Miss. Ry. Co.*, 142 U. S. 396.



followed by the appellate court.<sup>50</sup> Where the act authorizing an appeal is repealed pending an appeal, the appellate court loses jurisdiction of the appeal, unless the jurisdiction over pending appeals is reserved in the repealing act.<sup>51</sup> Where, pending an appeal from a decree on a creditor's bill founded upon a previous decree, the previous decree was reversed pending the appeal, the Supreme Court remanded the cause to the Circuit Court, with instructions to allow the appellant, the defendant below, to file such supplemental bill as he might be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree upon the new matter arising from the reversal of the decree in the former case.<sup>52</sup> Where, pending an appeal from a decree, a former decree in the same suit on which the latter was dependent was reversed, the Supreme Court held that the second decree was thereby nullified by operation of law, and dismissed the appeal therefrom with costs to the appellant.<sup>53</sup> Where, pending a writ of error from a judgment entered upon a plea of *res adjudicata* by a former judgment between the same parties, such former judgment was reversed, the Supreme Court reversed the second judgment.<sup>54</sup> Where, pending a writ of error to a judgment on a "forthcoming bond" to a former judgment, the former judgment was reversed, the Supreme Court said that the reversal of the second judgment would follow as of course, but that a *certiorari* was necessary to bring up the execution upon which the bond was given, so as to show the connection between the judgments.<sup>55</sup> Otherwise where,

<sup>50</sup> U. S. v. The Peggy, 1 Cranch, 108; Yeaton v. U. S., 5 Cranch, 281; Kansas Pac. R. Co. v. Twombly, 100 U. S. 78. Where, after a decree enjoining the execution of a statute, the statute was repealed, the appeal was dismissed. Flour Inspectors v. Glover, 160 U. S. 170. But see Leathe v. Thomas (C. C. A.), 97 Fed. R. 186. In a case where, after a sentence of condemnation, the sale of a vessel thereunder, and the payment of the proceeds to the United States, the act upon which the condemnation proceedings were based expired; the Supreme Court reversed the decree, and made a general order for the

restitution of the property condemned, stating that the question whether the proceeds of the property should be paid over to the claimants was "a matter to be left to the consideration of the court below." The Rachel v. U. S., 6 Cranch, 329, 330.

<sup>51</sup> Baltimore & P. R. Co. v. Grant, 98 U. S. 398; Ex parte McCardle, 7 Wall. 506.

<sup>52</sup> Ballard v. Searls, 130 U. S. 50, 56.

<sup>53</sup> Chicago & V. R. Co. v. Fosdick, 106 U. S. 47, 84, 85.

<sup>54</sup> Butler v. Eaton, 141 U. S. 240.

<sup>55</sup> Barton v. Petit, 7 Cranch, 288.

since the original decree, the rights of the parties have so changed as to make it improper to carry it into execution, relief can usually be had only through some form of original proceeding in the court in which the decree was rendered.<sup>56</sup> Where a plaintiff has voluntarily become nonsuit, he cannot have the proceedings reversed by a writ of error.<sup>57</sup> On an appeal from a decree entered by consent, the only question which can be considered is whether the court below had jurisdiction of the case so as to authorize it to enter any decree.<sup>58</sup> Where an appeal is taken from a decree entered upon an order taking a bill in equity as confessed by defendants for want of an answer, the only question for the consideration of the appellate court is whether the allegations of the bill and the proofs of service are sufficient to support the decree.<sup>59</sup>

As a general rule the appellate court has no power to review questions within the discretion of the court below;<sup>60</sup> but the

<sup>56</sup> *Mackall v. Richards*, 116 U. S. 45; *The Vaughan and Telegraph*, 14 Wall. 258.

<sup>57</sup> *U. S. v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Central Transp. Co. v. Pullman's P. C. Co.*, 139 U. S. 24, 39.

<sup>58</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289; *U. S. v. Babbitt*, 104 U. S. 767. See also *Mandeville v. Holey*, 1 Pet. 136.

<sup>59</sup> *Masterson v. Howard*, 18 Wall. 99; *Thomson v. Wooster*, 114 U. S. 104; *Dobson v. Hartford Carpet Co.*, 114 U. S. 439; *O'Hara v. MacConnell*, 98 U. S. 150.

<sup>60</sup> *Cook v. Burnley*, 11 Wall. 659; *Silsby v. Foote*, 14 How. 218; *Freeborn v. Smith*, 2 Wall. 160; *Cheang-Kee v. U. S.*, 8 Wall. 320; *Barton v. Forsyth*, 5 Wall. 190. The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the trial court, with which the appellate court ought not to interfere. *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448. So are all questions as to surprise, as to re-opening a case, or

as to the order of proof. *Ames v. Quimby*, 106 U. S. 342. To a large extent, the course and extent of a cross-examination of a witness is subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. *Rea v. Missouri*, 17 Wall. 532. But see *Eames v. Kaiser*, 142 U. S. 488. A judgment may, but rarely will, be reversed for the expressions of his opinion on the facts by the judge in his charge, when he left all the questions of fact to the decision of the jury. *Cf. Arey v. De Loriea* (C. C. A.), 55 Fed. R. 323. The decision of the trial court as to which party is entitled to the opening and closing of the argument to the jury will not be reviewed by the appellate court. *Hall v. Weare*, 92 U. S. 728; *Day v. Woodworth*, 13 How. 363; *Lancaster v. Collins*, 115 U. S. 222. An allowance or refusal of an amendment to a pleading is ordinarily a matter for the discretion of the court below. *Jenkins v. Banning*, 23 How. 455; *Ex parte Bradstreet*, 7 Pet. 634; *Wright v. Hollingsworth*, 1 Pet. 165; *Spencer*

discretionary exercise of equitable jurisdiction, for example, in granting or refusing specific performance, may be reviewed.<sup>61</sup> The granting or refusal of a motion for a new trial, either absolutely<sup>62</sup> or conditionally,<sup>63</sup> is within the discretion of the court;<sup>64</sup>

*v. Lapsley*, 20 How. 264. But see *Riddle v. Whitehill*, 135 U. S. 621, 627, 640. The refusal of the court below to allow new pleas to be filed cannot be assigned as error except in case of a gross abuse of discretion. *Mandeville v. Wilson*, 5 Cranch, 15, 17; *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206; *U. S. v. Buford*, 3 Pet. 12; *Dean v. Mason*, 20 How. 198; *Spencer v. Lapsley*, 20 How. 264; *Ætna Ins. Co. v. Weide*, 9 Wall. 677; *Chapman v. Barney*, 129 U. S. 677; *Gormley v. Bunyan*, 138 U. S. 623, 631. The continuance of a case or the refusal to continue it is in the discretion of the court to which the motion is made. *Woods v. Young*, 4 Cranch, 237; *Sims v. Hundley*, 6 How. 1; *Thompson v. Selden*, 20 How. 194; *McFaul v. Ramsey*, 20 How. 523; *Cook v. Burnley*, 11 Wall. 659; *Cox v. Hart*, 145 U. S. 376; *Davis v. Patrick* (C. C. A.), 57 Fed. R. 909; *Texas & Pac. Ry. Co. v. Humble* (C. C. A.), 97 Fed. R. 837; *Means v. Bank of Randall*, 146 U. S. 620; *Drexel v. True* (C. C. A.), 74 Fed. R. 12; *Baker v. Texarkana Nat. Bank* (C. C. A.), 74 Fed. R. 598. The decision of the trial court upon a challenge to the favor of a juror will rarely be reviewed. *Press Pub. Co. v. McDonald* (C. C. A.), 73 Fed. R. 440; *So. Pac. Co. v. Rauk* (C. C. A.), 49 Fed. R. 696. Decisions of administrative questions in the course of a receivership, such as granting leave to sue a receiver, *N. Y. Security & Tr. Co. v. Illinois Transfer R. Co.* (C. C. A.), 104 Fed. R. 710; or determining to retain a leasehold, *Mercantile Tr. Co. v. Farmers' L. & Tr. Co.* (C. C. A.), 81 Fed. R. 254, will rarely be reviewed upon appeal. An order setting aside an award of arbi-

trators may be reviewed by writ of error to the final judgment in the case. *Nolan v. Colo. Cent. Consol. Min. Co.* (C. C. A.), 63 Fed. R. 930. As to the review of masters' reports, see *Kimberley v. Arms*, 129 U. S. 512; *Oten v. Scalzo*, 145 U. S. 578, 589, 590; *Topliff v. Topliff*, 145 U. S. 156; *supra*, § 315.

<sup>61</sup> *Leicester Piano Co. v. Front R. & R. Imp. Co.* (C. C. A.), 55 Fed. R. 190.

<sup>62</sup> *Henderson v. Moore*, 5 Cranch, 11; *Blunt v. Smith*, 7 Wheat. 248; *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170; *U. S. v. Buford*, 3 Pet. 12; *Life & F. Ins. Co. v. Wilson*, 8 Pet. 291; *Doswell v. De La Lanza*, 20 How. 29; *Warner v. Norton*, 20 How. 448; *Pomeroy v. Bank of Indiana*, 1 Wall. 592; *Freeborn v. Smith*, 2 Wall. 160; *Laber v. Cooper*, 7 Wall. 565; *Ewing v. Howard*, 7 Wall. 499; *Home Ins. Co. v. Barton*, 13 Wall. 603; *Erskine v. Hohnbach*, 14 Wall. 613; *Republican R. B. Co. v. Kansas P. R. Co.*, 92 U. S. 315; *Cambuston v. U. S.*, 95 U. S. 285; *Young v. U. S.*, 95 U. S. 641; *Kerr v. Clappitt*, 95 U. S. 188; *San Antonio v. Mehaffy*, 96 U. S. 312; *Newcomb v. Wood*, 97 U. S. 581; *Kansas Pac. R. Co. v. Twombly*, 100 U. S. 78; *Boogher v. Insurance Co.*, 103 U. S. 90; *Jones v. Buckell*, 104 U. S. 554; *Embry v. Palmer*, 107 U. S. 3; *Terre Haute & Ind. R. Co. v. Struble*, 109 U. S. 381; *Alexander v. U. S.*, 57 Fed. R. 828, 830.

<sup>63</sup> *No. Pac. R. Co. v. Herbert*, 116 U. S. 642, n.

<sup>64</sup> *N. Y., L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 75; and authorities cited in notes 62 and 63, *supra*. But see *Coughlin v. District of Columbia*, 106 U. S. 7.

but where the court below refuses to consider a motion for a new trial upon the ground that it has no power to do so,<sup>65</sup> or improperly refuses to consider affidavits upon such a motion,<sup>66</sup> or grants a new trial when it has no power to act upon the motion,<sup>67</sup> the decision may be reviewed by a writ of error. It seems that exceptions to rulings on a motion to change the venue are not available on a writ of error.<sup>68</sup> The opening of a default is not subject to revision in the appellate court.<sup>69</sup> An order directing a compulsory nonsuit or a dismissal of a complaint<sup>70</sup> may be reviewed by writ of error to the final judgment.<sup>71</sup> An error that would not have been prejudicial to the plaintiff in error or appellant is no ground for a reversal.<sup>72</sup> The court of review will not consider exceptions taken by a party who has not sued out a writ of error or taken an appeal.<sup>73</sup>

On appeals from the Court of Claims, in the absence of a special statute, nothing can be reviewed but questions of law.<sup>74</sup> On appeals from the Court of Claims the findings of fact import absolute verity and conclude both parties.<sup>75</sup> Where the Court of Claims sends up as a part of its findings of facts all the evidence on which an essential fact was found, and there is no legal evidence to establish such fact, the Supreme Court must reverse the judgment, if the fact so found is essential to

<sup>65</sup> *Felton v. Spiro* (C. C. A.), 78 Fed. R. 576.

<sup>66</sup> *Clyde Mattox v. U. S.*, 146 U. S. 140, 147; *supra*, § 876.

<sup>67</sup> *City of Manning v. German Ins. Co.* (C. C. A.), 107 Fed. R. 52, 54.

<sup>68</sup> *McFaul v. Ramsey*, 20 How. 528; *Cook v. Burnley*, 11 Wall. 659.

<sup>69</sup> *U. S. v. Estudillo*, 1 Wall. 710; *McAllister v. Kuhn*, 96 U. S. 87.

<sup>70</sup> *Central Transp. Co. v. Pullman's P. C. Co.*, 139 U. S. 24, 39.

<sup>71</sup> *Elmore v. Grymes*, 1 Pet. 469; *Central Transp. Co. v. Pullman's P. C. Co.*, 139 U. S. 24, 39.

<sup>72</sup> Such as the erroneous admission of evidence which could not have affected the result. *Holmes v. Goldsmith*, 147 U. S. 150; *U. S. v. Shapleigh* (C. C. A.), 54 Fed. R. 126, 137; *Dorsheimer v. Glenn*, 51 Fed. R. 404. A judgment will not be reversed for

an erroneous instruction to the jury where the evidence justified a direction in favor of the defendant in error. *W. B. Grimes Dry Goods Co. v. Malcolm*, 58 Fed. R. 670. Nor for an erroneous instruction inapplicable to the case. *Crosby Lumber Co. v. Smith* (C. C. A.), 51 Fed. R. 68. Nor for an erroneous instruction which could have done no harm. *Cf. Iron Silver Min. Co. v. Mike & S. G. & S. Min. Co.*, 143 U. S. 394; *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 51 Fed. R. 649, 655. But see *Deery v. Crary*, 5 Wall. 795; *Smith v. Shoemaker*, 17 Wall. 630.

<sup>73</sup> *U. S. v. Blackfeather*, 155 U. S. 180.

<sup>74</sup> *Mahan v. U. S.*, 14 Wall. 109; *U. S. v. Smith*, 94 U. S. 214.

<sup>75</sup> *Desmare v. U. S.*, 93 U. S. 605; *Talbert v. U. S.*, 155 U. S. 45.

the judgment.<sup>76</sup> The judgment of the Court of Claims as to the legal effect of the ultimate circumstantial facts in a case may be reviewed on appeal.<sup>77</sup> The conclusions of law drawn from the findings of fact may be reviewed.<sup>78</sup> Questions of law arising in the course of a trial before the Court of Claims may also be reviewed upon appeal.<sup>79</sup> Upon a question of fraud or mistake, the Supreme Court will not go behind the findings of fact of the Court of Claims.<sup>80</sup>

§ 518. **Mandate.**—The judgment of the appellate court is embodied in a mandate which is sent down to the court whose proceedings have been reviewed by writ of error or appeal. Neither the Supreme Court nor the Circuit Court of Appeals has power to issue execution on appeal or error to the judgment or decree of a Federal court.<sup>1</sup> A mandate may be recalled from the inferior court, and corrected or set aside, at the term at which it is issued.<sup>2</sup> An application to recall and correct a mandate cannot be made after the close of the term.<sup>3</sup> In a case in which the appellate court had no jurisdiction, it may of its own motion modify the judgment, recall a mandate of affirmance, pending the term at which it was issued, and dismiss the writ of error.<sup>4</sup> No mandate issues without an order from the appellate court, which is usually granted only on consent or upon notice. It was the former practice in the Supreme Court of the United States, when no special circumstances were shown, to issue no mandates, except immediately before the February recess, and immediately before the conclusion of the term. Where a party has died after argument,<sup>5</sup> or where an appeal or writ of error has been argued in ignorance of his

<sup>76</sup> U. S. v. Clark, 96 U. S. 87.

<sup>77</sup> U. S. v. Pugh, 99 U. S. 265.

<sup>78</sup> Union Pac. R. Co. v. U. S., 116 U. S. 154. See also *The Adriatic*, 107 U. S. 512.

<sup>79</sup> McClure v. U. S., 116 U. S. 145.

<sup>80</sup> U. S. v. Adams, 6 Wall. 101. As to decisions upon appeals from Territorial courts, see *Mammoth Min. Co. v. Salt Lake F. & M. Co.*, 151 U. S. 447; *supra*, §§ 496, 497.

§ 518. <sup>1</sup> U. S. R. S., § 701; 26 St. at L. 826, §§ 10, 11.

<sup>2</sup> Killian v. Ebbinghaus, 111 U. S.

798; *Ex parte Crenshaw*, 15 Pet. 119; U. S. v. Gomez, 23 How. 326.

<sup>3</sup> Schell v. Dodge, 107 U. S. 629; Killian v. Ebbinghaus, 111 U. S. 798; *Minn. Tribune Co. v. Associated Press* (C. C. A.), 84 Fed. R. 921; *Hawkins v. Cleveland, C., C. & St. L. Ry. Co.* (C. C. A.), 99 Fed. R. 322; *s. c.* (C. C. A.), 89 Fed. R. 266.

<sup>4</sup> U. S. v. Gomez, 23 How. 326; *Cannon v. U. S.*, 118 U. S. 355; *Ex parte Crenshaw*, 15 Pet. 110.

<sup>5</sup> Clay v. Smith, 8 Pet. 411. See S. C. Rule 39, quoted *infra*.

death,<sup>6</sup> or in a case where it is necessary to prevent an abatement which would cause injustice;<sup>7</sup> the judgment of the appellate court may be entered *nunc pro tunc* as of a date prior to his death.

Where a judgment for the payment of money is affirmed by the Supreme Court upon a writ of error, interest is awarded to the defendant in error from the day of the judgment until its payment, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.<sup>8</sup> The same rule applies to decrees for the payment of money in cases in equity, unless otherwise ordered by the appellate court.<sup>9</sup> "In cases in admiralty, damages and interest may be allowed if specially directed by the court."<sup>10</sup> Unless interest is included in the mandate it cannot be awarded after the affirmance.<sup>11</sup> In case interest is improperly allowed by the court below, and the amount of the interest is insufficient to warrant a writ of error, the appellate court may compel the court below by a mandamus to vacate so much of the judgment as awards interest.<sup>12</sup> Where proceedings under the judgment or decree below have been stayed, and the appellate court considers that the writ of error or appeal was taken merely for delay, damages at the rate of ten per cent. in addition to the interest may be awarded.<sup>13</sup> Where a judgment or decree which is reversed has been executed pending the writ of error or ap-

<sup>6</sup> *Bank of U. S. v. Weisiger*, 2 Pet. 481.

<sup>7</sup> *Coughlin v. District of Columbia*, 106 U. S. 7.

<sup>8</sup> S. C. Rule 23; C. C. A. Rule 80; U. S. R. S., § 1010; *Perkins v. Fourniquet*, 14 How. 328; *McNiel v. Holbrook*, 12 Pet. 84. As to the power of the District of Columbia Court of Appeals, see *Washington & G. R. Co. v. Harmon's Adm'r*, 147 U. S. 571, 589.

<sup>9</sup> S. C. Rule 23; C. C. A. Rule 80; U. S. R. S., § 1010.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Boyce v. Gundy*, 9 Pet. 275, 289; *Green v. Chicago, S. & C. Ry. Co. (C. C. A.)*, 49 Fed. R. 957. But costs of the court below have been awarded although not directed in

the mandate. *U. S. v. So. Pac. R. Co.*, 56 Fed. R. 865.

<sup>12</sup> *In re Washington & G. R. Co.*, 140 U. S. 91.

<sup>13</sup> S. C. Rule 23; C. C. A. Rule 80; U. S. R. S., § 1010; *Barrow v. Hill*, 13 How. 54; *Sutton v. Bancroft*, 23 How. 320; *Kilbourne v. State Sav. Inst.*, 22 How. 503; *Sire v. Ellithorpe A. Br. Co.*, 137 U. S. 579; *Whitney v. Cook*, 131 U. S. cxcvii; *Insurance Co. v. Huchbergers*, 12 Wall. 164; *Hennessy v. Sheldon*, 12 Wall. 440; *Hall v. Jordan*, 19 Wall. 271; *Peyton v. Heinekin*, 131 U. S. ci; *Jenkins v. Banning*, 23 How. 455; *Prentice v. Pickersgill*, 6 Wall. 511; *Campbell v. Wilcox*, 10 Wall. 421; *Amory v. Amory*, 91 U. S. 856; *Texas & P. Ry. Co. v. Volk*, 151 U. S. 78; *Wat-*



peal, the mandate should include a direction to the court below to compel restitution.<sup>14</sup> This is so, even when the reversal is because of want of jurisdiction of the court below.<sup>15</sup> Restitution may be enforced by contempt proceedings.<sup>16</sup> Where a third person has received funds or property of which restitution is ordered, he may be obliged to return the same, provided he is within the territorial jurisdiction of the court, and no equities on his part would make restitution improper.<sup>17</sup> It has been held that restitution by the United States cannot be compelled.<sup>18</sup> Where, pending an appeal, costs awarded in the decree were paid by consent, it was held that their repayment would not be directed upon a reversal.<sup>19</sup> Where the person who is ordered to make restitution has paid duties or other charges thereon, he may be allowed the amount so paid.<sup>20</sup> Upon the filing of the mandate in the court below, that court acquires jurisdiction of the case.<sup>21</sup> The inferior court is bound

*terson v. Payne*, 154 U. S. 584. A less sum than ten per cent. may also be awarded for damages on an appeal. *West Wisconsin R. Co. v. Foley*, 94 U. S. 100. The power of the Supreme Court to award the damages for delay is not confined to money judgments. In one case five hundred dollars damages were awarded for delay on an appeal from a decree for specific performance. *Gibbs v. Diekma*, 131 U. S. clxxxvi.

<sup>14</sup> *The Rachel v. U. S.*, 6 Cranch, 329; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Morris's Cotton*, 8 Wall. 507; *Ex parte Morris*, 9 Wall. 605. No extra damages can be awarded when an appeal or writ of error is dismissed for want of jurisdiction. *Gregory Consol. Min. Co. v. Starr*, 141 U. S. 222, 227.

<sup>15</sup> *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

<sup>16</sup> *Ex parte Morris*, 9 Wall. 605.

<sup>17</sup> *Ibid.*

<sup>18</sup> *The Santa Maria*, 10 Wheat. 431.

<sup>19</sup> *Groves v. Sentell*, 66 Fed. R. 179. See *Miller v. Clark*, 52 Fed. R. 900; *Lamb v. Ewing*, 54 Fed. R. 269; *Robinson v. A. & G. M. Co.*, 67 Fed. R. 189.

<sup>20</sup> *Ex parte Morris*, 9 Wall. 605. See *The Schooner Rachel v. U. S.*, 6 Cranch, 329.

<sup>21</sup> It has been held that on an appeal from a decision denying a writ of *habeas corpus*, the State court is at liberty to act as soon as the judgment of the appellate court has been entered, and need not wait until the mandate has been sent down. "Where in such a case as this, the State court proceeds after final judgment, as here on the appeal of the person imprisoned or held in custody, but before our mandate goes down to the Circuit Court, it does so at the risk that its orders may be controlled and, if need be, annulled, if this court, during the term, should suspend or set aside its own judgment. While it is not difficult to perceive that serious complications may sometimes arise where the State court acts with undue haste, and proceeds before the mandate of this court is issued and without any special application being made therefor, we do not feel at liberty to declare its action, taken after and in conformity with the final judgment here, to be void, simply because it was taken

by a decree of the appellate court, and must carry it into execution according to the mandate.<sup>22</sup> It has been said that when a mandate affirms the judgment or decree of the court below, that court can only record the order of the appellate court, and proceed with the execution of its own decree as affirmed.<sup>23</sup> After the whole case has been decided in the Supreme Court and remanded for final judgment, the State court has no power to dismiss a suit in equity on the ground that the plaintiff has a remedy at law.<sup>24</sup> It is too late to question the jurisdiction of the Circuit Court after the cause has been sent back by a mandate.<sup>25</sup>

before the mandate was sent down." Harlan, J., *In re Jugiro*, 140 U. S. 291, 296. It has been held at circuit that the statute of limitations against the right of a purchaser of personal property to sue for a breach of warranty of title begins to run from the time his title is declared invalid by a decision of the court of last resort, not from the time when the mandate of such court is filed below. *Nickles v. U. S.*, 42 Fed. R. 757.

<sup>22</sup> *Sibbald v. U. S.*, 12 Pet. 488. See also *Campbell v. James*, 81 Fed. R. 525. It cannot modify it in accordance with subsequent decisions of the Supreme Court which are inconsistent with the mandate in the case. *Gaines v. Caldwell*, 148 U. S. 228.

<sup>23</sup> *Durant v. Essex County*, 101 U. S. 555. Where the judgment was affirmed "as in the declaration claimed," and the declaration claimed more than the judgment, it was held to be simply an affirmance. *Balt. & P. R. Co. v. Mackay*, 157 U. S. 72. As to the form of a mandate upon the affirmance of an order or decree granting an injunction, see *Goshen Sweeper Co. v. Bissell C. S. Co.* (C. C. A.), 72 Fed. R. 67; *Hadden v. Dooley* (C. C. A.), 74 Fed. R. 429. Where the Supreme Court had affirmed a title to land in Florida according to a particular survey, it was held that the court below had no power to

open the case for the purpose of adopting another survey. *Chaires v. U. S.*, 3 How. 611. After a general decree, in the Supreme Court, of restitution in a prize case, the captors or purchasers under them cannot set up in the court below new claims for equitable deductions, meliorations, or charges, even if such claims would have been allowed had they been asserted before the original decree. *The Santa Maria*, 10 Wheat. 481. Where a decree after an accounting was "reversed, and the case remanded with instructions to strike out allowances for rental" before a certain date, and to allow subsequent rentals, it was held that this in effect affirmed so much of the decree as allowed these subsequent rents; that the Circuit Court had no power to reopen the inquiry into the accounts; and that interest on the rents as allowed was properly awarded by the Circuit Court in its decree on the mandate. *Kneeland v. Am. Loan & Tr. Co.*, 136 U. S. 89, 103; s. c., 138 U. S. 509. See *Latta v. Granger*, 167 U. S. 81; *Ex parte Washington & G. R. Co.*, 140 U. S. 91; *Gaines v. Caldwell*, 148 U. S. 228; *Groff v. Boesch*, 50 Fed. R. 660.

<sup>24</sup> *Tyler v. Magwire*, 17 Wall. 255.

<sup>25</sup> *Skillern v. May*, 6 Cranch, 267; *Whyte v. Gibbes*, 20 How. 541; *Billings v. Aspen M. & S. Co.*, 58 Fed.

After a decree on appeal, leave to file a supplemental bill, setting up new defenses growing out of matters occurring after the mandate was sent down, should ordinarily be denied.<sup>28</sup> But where a decree is reversed with directions that further

R. 561. Where the judgment below has been reversed, and the mandate directs that judgment be entered for the defendant below, the court below has no power to grant a new trial, *Ex parte Dubuque & Pac. R. Co.*, 1 Wall. 69; except in ejectment, when a State statute allows a second trial as a matter of right, irrespective of error. *Smale v. Mitchell*, 143 U. S. 99, 109. The court below has no power, after a case in equity has been decided by the appellate court and remanded with directions for execution, to permit the defendant to file a supplemental answer to show the death of a party, and the abatement of the suit before the appeal, and the lack of a necessary party. *Ex parte Story*, 12 Pet. 389. In a case where the Supreme Court of the United States had reversed a judgment of the highest court of a State and directed that court to conform its judgment to the opinion of the Supreme Court, but the fact on which the judgment was reversed did not appear on the record from the lower State court from which the case was brought to the highest State court, and the latter court in consequence claimed it had no jurisdiction to reverse the judgment of the lower court, but instead dismissed its own writ of error to the lower court; the Supreme Court of the United States affirmed the latter judgment. *Davis v. Packard*, 8 Pet. 312. Where a case has been remanded to an inferior court for further proceedings, such inferior court may allow additional pleas, or permit amendments to be made to the pleas already filed, even after the appellate court has decided such

pleas were bad upon demurrer. *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206. Where a judgment in favor of defendant on a demurrer has been reversed, the court below may enter judgment overruling the demurrer, and allow the defendant to answer. *U. S. v. Boyd*, 15 Pet. 187. Where a decree is reversed for insufficient allegations of citizenship in the pleadings, the Circuit Court may allow them to be corrected by amendment. *Everhart v. Huntsville College*, 120 U. S. 223. Where the Supreme Court, in dismissing an appeal, determined the value of the matter in dispute, the Circuit Court held that that was conclusive as to its jurisdiction, and upon a bill of review dismissed the bill. *Miller v. Clarke (C. C. A.)*, 52 Fed. R. 900. It is no error, on the execution of the mandate of the inferior court, to permit a third person to become a party and set up rights not embraced in the former decree, when all parties consent thereto. *Hawkins v. Blake*, 108 U. S. 422. See *Balt. Bldg. & L. Ass'n v. Alderson (C. C. A.)*, 99 Fed. R. 489.

<sup>28</sup> *Mackall v. Richards*, 116 U. S. 45. But after the mandate, a bill to enjoin the enforcement of the judgment may be sustained. *Brown v. Walker*, 84 Fed. R. 532. It seems that the affirmance of an interlocutory order or decree for an injunction does not deprive the court below of the power to suspend the injunction temporarily. *Edison El. L. Co. v. U. S. El. L. Co.*, 59 Fed. R. 501; *s. c. (C. C. A.)*, 52 Fed. R. 800. Where a party to the appeal desires to file a bill of review after an affirmance, it is the safer practice to have included in

proceedings be had, not inconsistent with the opinion of the appellate court, the court of first instance has plenary authority to allow amendments and further proof, except in so far as the opinion or mandate specifically forbids.<sup>27</sup> The mandate must be interpreted according to its subject-matter, and the decree of the court below as well as that of the appellate court may be taken into consideration in the interpretation thereof.<sup>28</sup>

Where the inferior court of the United States refuses to obey the mandate of the Supreme Court or the Circuit Court of Appeals, the appellate court may compel a compliance by a mandamus or other appropriate writ;<sup>29</sup> or by a mandate on a

the mandate a direction that the appellate court reserves to such party liberty to file in the Circuit Court an application for leave to file a bill of review and to proceed thereon, and on such bill of review in the Circuit Court as the Circuit Court may determine. *Watson v. Stevens* (C. C. A.), 53 Fed. R. 31; *Smith v. Weeks*, (C. C. A.), 53 Fed. R. 758; *supra*, §§ 354, 356.

<sup>27</sup> *Hawkins v. Cleveland, C., C. & St. L. Ry. Co.* (C. C. A.), 99 Fed. R. 322; *C. & A. Potts & Co. v. Creager*, 71 Fed. R. 574; *Edwards v. Bates County*, 79 Fed. R. 56. *Cf.* *No. Pac. R. Co. v. Walker*, 148 U. S. 391.

<sup>28</sup> *Mitchel v. U. S.*, 15 Pet. 52; *Story v. Livingston*, 13 Pet. 359; *Mackall v. Richards*, 116 U. S. 45. Where the Supreme Court had reversed a decree of the Circuit Court upon the ground that there was no equitable jurisdiction, a decree dismissing the bill absolutely was reversed upon a second appeal, with directions to enter a decree dismissing the bill without prejudice. *Rogers v. Durant*, 106 U. S. 644. It was held at circuit that where the mandate directed the dismissal of the bill, the Circuit Court had power to enter a decree dismissing an amended bill, *Campbell v. James*, 81 Fed. R. 525; that where the mandate directed the reversal of a judgment with costs in the Su-

preme Court to the plaintiff in error, the defendant below, and that judgment be entered for the defendant in error, the plaintiff below, for a less sum than that allowed him by the former judgment, the Circuit Court might also allow the plaintiff below the costs of the case in the Circuit Court, *Bartels v. Redfield*, 47 Fed. R. 708; that where an appeal had been dismissed, and the mandate directed the Circuit Court below to take such proceedings as might be according to right and justice, the said appeal notwithstanding, the Circuit Court might proceed as if no appeal had been taken, and the time for an appeal specified in the decree had expired, *The Sydney*, 47 Fed. R. 260; and that if there was any error in a decree of a Circuit Court dismissing a bill on mandate from the Supreme Court, it could only be corrected at the term of its entry, or by proceedings for review under the rules or on appeal, not by motion at a subsequent term, *Campbell v. James*, 81 Fed. R. 525.

<sup>29</sup> *Sibbald v. U. S.*, 12 Pet. 488; *Gaines v. Rugg*, 148 U. S. 228; *City Bank of Fort Worth v. Hunter*, 153 U. S. 512; *supra*, § 363; *No. Al. Dev. Co. v. Orman* (C. C. A.), 71 Fed. R. 764. But see *In re Humes*, 149 U. S. 192.

second appeal or writ of error.<sup>30</sup> Where a State court refuses to obey the mandate of the Supreme Court of the United States, the Supreme Court has power to award execution in the case.<sup>31</sup> The practice is, when a State court refuses to obey the mandate of the Supreme Court of the United States, to sue out a second writ of error.<sup>32</sup> Upon such second writ of error, when the cause has been remanded after final judgment, nothing is brought up for review except the proceedings of the State court subsequent to the mandate.<sup>33</sup> In the Supreme Court "mandates shall issue, as of course, after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term."<sup>34</sup>

§ 519. Second writ of error or appeal.—A second appeal or writ of error may be taken when the first appeal or writ of error has been dismissed for a defect in form or failure to perfect the same, and the original time to appeal or bring error has not expired.<sup>1</sup> When a writ of error has been dismissed, be-

<sup>30</sup> Rogers v. Durant, 106 U. S. 644; Nashua & L. Corp. v. Boston & L. R. Corp., 51 Fed. R. 929, 931. This is the more usual remedy, *infra*, § 519.

<sup>31</sup> U. S. R. S., § 709.

<sup>32</sup> Martin v. Hunter, 1 Wheat. 304; Roberts v. Cooper, 20 How. 467; Tyler v. Magwire, 17 Wall. 253.

<sup>33</sup> Sizer v. Many, 16 How. 98; Corning v. Troy L. & N. Factory, 15 How. 451, 466; Himely v. Rose, 5 Cranch, 513; Martin v. Hunter, 1 Wheat. 304, 355; Roberts v. Cooper, 20 How. 467; Tyler v. Magwire, 17 Wall. 253, 284. In one case, upon such a second writ to a State court, the Supreme Court entered a final decree, and issued a writ of possession to carry the same into effect. Tyler v. Magwire, 17 Wall. 253, 292. The Supreme Court in another case, without a second writ of error, recalled its mandate, entered judgment, and awarded execution. Williams v. Bruffy, 102 U. S. 248. The Supreme Court de-

nied a motion that it should take action to cause the judgment of a State court to be reversed in accordance with a mandate of the Supreme Court previously issued, directing such reversal, where the petition alleged that the petitioner had placed the mandate in the hands of the presiding justice of the highest court of the State, and prayed that such proceedings might be taken as would cause the judgment of the inferior State court to be reversed, and that the highest court of the State had taken no action in the matter, and the judgment of the inferior court remained in full force and unreversed, but there were no other allegations showing that the petitioner had ever applied to the highest court of a State to carry the mandate of the Supreme Court into effect. In re Royall, 125 U. S. 696.

<sup>34</sup> S. C. Rule 39.

§ 519. <sup>1</sup> Yeaton v. Lenox, 8 Pet. 123;

cause the Supreme Court decided that on the record before it the value of the matter in dispute was less than the jurisdictional amount, a second writ of error on further proof of value is not a writ of right.<sup>2</sup> After a decision upon an appeal or a writ of error, a second appeal or writ of error will lie to bring up proceedings subsequent to the mandate, and not settled by the terms of the mandate itself.<sup>3</sup> After the final decree or judgment of the court below upon the mandate of an appellate court, the proceedings may be reviewed by appeal or writ of error in case it is claimed that the mandate has not been obeyed.<sup>4</sup> When a mandate has been sent down upon a prior writ of error or appeal, no second appeal or writ of error can be sustained, until the court below has made its final judgment or decree in the case.<sup>5</sup> A second appeal or writ of error will be dismissed if it appears that the decree below was entered in exact accordance with the mandate, and that no subsequent proceedings have been taken.<sup>6</sup>

*Edmondson v. Bloomshire*, 7 Wall. 306; *The Virginia v. West*, 19 How. 182; *The Palmyra*, 12 Wheat. 1.

<sup>2</sup> *Red River Cattle Co. v. Needham*, 47 Fed. R. 358. A decision of the Supreme Court upon a certificate of division of opinion, under the former practice, did not preclude a subsequent writ of error to the final judgment below. *Ogle v. Lee*, 2 Cranch, 83.

<sup>3</sup> *Hinckley v. Morton*, 103 U. S. 764; *Mackall v. Richards*, 112 U. S. 369.

<sup>4</sup> *Perkins v. Fourniquet*, 14 How. 328; *Martin v. Hunter*, 1 Wheat. 304; *Roberts v. Cooper*, 20 How. 467; *Cook v. Burnley*, 11 Wall. 659; *Tyler v. Magwire*, 17 Wall. 253.

<sup>5</sup> *U. S. v. Fossatt*, 21 How. 445; *U. S. v. Fremont*, 18 How. 80.

<sup>6</sup> *Mackall v. Richards*, 116 U. S. 45; *Stewart v. Salamon*, 97 U. S. 361; *Humphrey v. Baker*, 103 U. S. 786. See *Walden v. Bodley's Heirs*, 9 How. 34, 48; *U. S. v. N. Y. Indians*, 173 U. S. 464; *Tyler v. Last Chance Mine* (C. C. A.), 97 Fed. R. 894; *In re Pike* (C. C. A.), 76 Fed. R. 400; *Greg-*

*ory v. Pike* (C. C. A.), 77 Fed. R. 241. Even when the mandate was from the Circuit Court of Appeals and the case is one in which an appeal lies from the decision of that court to the Supreme Court. *Merrill v. National Bank* (C. C. A.), 78 Fed. R. 208; s. c., 173 U. S. 181. A Circuit Court of Appeals cannot ordinarily review the proceedings of a Circuit Court in obedience to the mandate of the Supreme Court. *Texas & Pac. Ry. Co. v. Anderson*, 140 U. S. 237. A recall of the mandate sent by the Circuit Court of Appeals to the Circuit Court is not required as a prerequisite condition or in aid of an appeal to the Supreme Court in a case where the decision of the Circuit Court of Appeals is not final; since the transcript of the record remains in the Circuit Court of Appeals. *Ritter v. Mutual L. L. Co.* (C. C. A.), 72 Fed. R. 567. Cf. *Merrill v. Nat. Bank of Jacksonville*, 173 U. S. 181; s. c. as *Merrill v. First Nat. Bank* (C. C. A.), 75 Fed. R. 148.



Upon a second writ of error or appeal, when the facts are unchanged, the law of the case first declared remains the law.<sup>7</sup> Upon a second writ of error or appeal, subsequent to a mandate, no inquiry into the merits of the original judgment or decree, nor into any question before the appellate court on the first writ of error or appeal, can be considered.<sup>8</sup> Upon a second appeal in a prize cause, no interest can be decreed which was not claimed upon the original hearing or upon the original appeal.<sup>9</sup> Where the mandate of the appellate court on the original appeal was that the damages be divided, and the respondent then claimed no damages, he cannot make such claim for the first time in the appellate court on a second appeal.<sup>10</sup>

A motion to extend the time for returning an appeal previously granted, and an order granting such motion, cannot be considered as a second appeal.<sup>11</sup> After a dismissal of one appeal no second appeal can be docketed until after an allowance thereof.<sup>12</sup> Proceedings by representatives of a deceased appellant to become parties to the appeal do not constitute a new appeal.<sup>13</sup> A second writ of error taken after the death of the original plaintiff in error is void; the action must first be revived in the court below, and the writ of error must then issue in the name of the representative of the original plaintiff in error.<sup>14</sup>

<sup>7</sup> *Johnston v. Jones*, 1 Black, 209; *Mathews v. Columbia Nat. Bank* (C. C. A.), 100 Fed. R. 893; *Thatcher v. Gottlieb* (C. C. A.), 51 Fed. R. 373; *Florida Cent. & P. R. Co. v. Cutting* (C. C. A.), 68 Fed. R. 586; *Oregon R. R. & Nav. Co. v. Balfour* (C. C. A.), 90 Fed. R. 295; *Patton v. Texas & P. Ry. Co.* (C. C. A.), 95 Fed. R. 244. This is not true of all the dicta in the opinion. *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228; *The E. A. Packer* (C. C. A.), 58 Fed. R. 251. Nor is the decision conclusive upon points which might have been but were not then raised. *Balch v. Haas* (C. C. A.), 73 Fed. R. 974; *Ex parte Union Steamboat Co.*, 178 U. S. 317.

<sup>8</sup> *Cook v. Burnley*, 11 Wall. 659; *The Santa Maria*, 10 Wheat. 431;

*Washington Br. Co. v. Stewart*, 8 How. 418; *Sizer v. Many*, 16 How. 98; *Roberts v. Cooper*, 20 How. 467; *Tyler v. Magwire*, 17 Wall. 253; *Supervisors v. Kennicott*, 94 U. S. 498; *The Lady Pike*, 98 U. S. 461; *Ames v. Quimby*, 106 U. S. 842; *Clark v. Keith*, id. 464; *U. S. v. The Nuestra Señora De Regla*, 108 U. S. 92; *Chaffin v. Taylor*, 116 U. S. 567.

<sup>9</sup> *Thompson v. Maxwell L. G. & Ry. Co.*, 168 U. S. 451; *Ala. G. S. R. Co. v. Carroll* (C. C. A.), 84 Fed. R. 772; *The Santa Maria*, 10 Wheat. 431.

<sup>10</sup> *The Sapphire*, 18 Wall. 51.

<sup>11</sup> *U. S. v. Curry*, 6 How. 106.

<sup>12</sup> *Rogers v. Law*, 21 How. 526.

<sup>13</sup> *Edmonson v. Bloomshire*, 7 Wall. 306.

<sup>14</sup> *McClane v. Boon*, 6 Wall. 244.

The appellate court may award a *supersedeas* on a second writ of error;<sup>15</sup> but not in a case where a prior writ of error has been dismissed, unless it appears that the first writ of error was accompanied by a *supersedeas* duly obtained in the court below, and perhaps not unless it appears that the dismissal of the first writ was not due to the neglect or fault of the plaintiff in error.<sup>16</sup>

<sup>15</sup> *Hardeman v. Anderson*, 4 How. 640.

<sup>16</sup> *Hogan v. Ross*, 11 How. 294;  
*Hardeman v. Anderson*, 4 How. 640.



# APPENDIX.

## I.

### FORMS.

The following forms have been selected and copied almost *verbatim* from precedents which have been actually used in the courts. The author has inserted them by the advice of the publisher and other friends, in the hope that they may be of some use to the profession; but he disclaims all responsibility for their correctness.

#### FORM I.—BILL IN EQUITY IN PATENT CASE.

*Circuit Court of the United States, Southern District of New York.*

THE WEBSTER LOOM COMPANY

*against*

ELIAS S. HIGGINS, HENRY M. BROOKS, and EUGENE  
HIGGINS, doing business under the name and  
style of ELIAS S. HIGGINS & Co. } In Equity.

*To the Honorable the Judges of the Circuit Court of the United States in  
and for the Southern District of New York:*

The Webster Loom Company, a corporation organized under and pursuant to the laws of the State of New York, and having its principal place of business in the City of New York in said State, brings this its bill of complaint against Elias S. Higgins, Henry M. Brooks, and Eugene Higgins, all of the City, County, and State of New York, and citizens of said State, and doing business under the name and style of Elias S. Higgins & Company.

And, thereupon, your orator complains and says that heretofore and before the 27th day of August, 1872, one William Webster, then of Morrisania, in the State of New York, was the original and first inventor of a certain new and useful improvement in looms for weaving pile fabrics not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application for a patent therefor.

And your orator further shows unto your Honors that the said William Webster, so being the inventor of said improvement, made application to the Commissioner of Patents, in accordance with the then existing laws of the United States, and complied in all respects with the conditions and requirements of said laws.

And, thereafter, on the 27th day of August, 1872, Letters Patent of the United States numbered No. 180,961, signed, sealed and executed in due form of law, and bearing date the day and year last aforesaid, were issued to said William Webster, whereby there was secured to him and to his heirs and assigns for the term of seventeen years from the 27th day of August, 1872, the full and exclusive right of making, using and vending the said improvement throughout the United States and the Territories thereof, as by a certified copy of said Letters Patent, in Court to be produced, will more fully appear.

And your orator further shows, that by an instrument in writing, bearing date the first day of October, 1872, the said William Webster duly assigned, transferred and set over unto himself, jointly with Cornelius M. Meserole and William G. Smith, all his the said Webster's right, title and interest in and to said Letters Patent and the invention thereby secured, which said assignment was duly recorded on the — day of —, 18—, in the Patent Office of the United States, in Liber —, as by said assignment, with the certificate of recording thereto affixed, or a duly certified copy of said assignment, in Court to be produced, will more fully and at large appear.

And your orator further shows, that by an instrument in writing, bearing date the 20th day of October, 1873, the said Webster, Meserole and Smith duly assigned, transferred and set over unto your orator all their, and each of their right, title and interest in and to said Letters Patent and the invention thereby secured, which said assignment was duly recorded on the — day of —, 18—, in the Patent Office of the United States, in Liber —, as by said assignment, with the certificate of recording thereto affixed, or a duly certified copy of said assignment, in Court to be produced, will more fully and at large appear.

And your orator further shows, that thereafter, to wit, on or about the 26th day of May, 1874, the said Webster individually, and the said Webster, Meserole and Smith, sold, assigned, transferred and set over unto your orator all and every right and cause of action which they the said Webster, Meserole and Smith might have, jointly or severally, against any person, firm or corporation arising out of the infringement of the said Letters Patent, and your orator by means of said assignments became vested with the right to recover such damages and profits as the said Webster, Meserole and Smith were jointly or severally entitled to recover since the said date of the said patent and prior to the assignment thereof by the said Webster, Meserole and Smith to your orator on or about the 20th day of October, 1873.

And your orator further shows that by virtue of the assignments aforesaid your orator became and now is the sole and exclusive owner of said Letters Patent and of the invention and improvement therein described and claimed and of all rights secured by said Letters Patent since the date thereof, and is entitled to be protected in the enjoyment of the same.

And your orator further shows upon information and belief, that prior to the assignment of the said Letters Patent to your orator, the said Webster, Meserole and Smith recovered a decree upon said Letters Patent in a suit in the Circuit Court of the United States for the District of New Jersey

against the New Brunswick Carpet Company; and also commenced a suit upon said Letters Patent in the Circuit Court of the United States for the District of Massachusetts against the firm of Gilbert and Taft, by whom the looms used by the New Brunswick Carpet Company were constructed at Worcester, Massachusetts, and in which said last named suit the defendants by their counsel consented to a decree restraining the construction of further looms of the kind made and sold by the said Gilbert and Taft to the New Brunswick Carpet Company; and on the 27th day of April, 1874, recovered a decree upon said Letters Patent against one John Cochrane, Jr., in the Circuit Court of the United States for the District of Massachusetts, who was also using looms constructed by the said Gilbert and Taft. That on or about the first day of June, 1874, a suit was commenced in the Circuit Court of the United States for the Southern District of New York, against Elias S. Higgins and Nathaniel D. Higgins for the infringement of said Letters Patent. That at the October Term of said Court in the year 1878, a decision was rendered in said suit by the Honorable Hoyt H. Wheeler, denying the relief prayed for in said suit and directing that a decree be entered dismissing the Bill of Complaint with costs.

That said decree was duly entered and an appeal was duly taken to the Supreme Court of the United States.

That said cause came on to be heard at the October term of said Supreme Court in the year 1881, and a decision was rendered sustaining the validity of said Letters Patent and adjudging the infringement of said Letters Patent by the said defendants Elias S. Higgins and Nathaniel D. Higgins, and directing that the decree of the said Circuit Court be reversed and the cause remanded with instructions to enter a decree in favor of the complainants and to take such further proceedings as law and justice might require.

That thereafter a decree against said defendants was duly entered in said Circuit Court for the Southern District of New York in conformity with the mandate of the said Supreme Court.

All of which matters and things will more fully and at large appear by reference to said decisions and decrees, or duly authenticated copies thereof here in Court to be produced, to which your orator craves leave to refer.

And your orator further shows that but for the infringement herein complained of, and others of like character, your orator would still be in the undisturbed possession, use and enjoyment of the exclusive privilege secured by the said Letters Patent, and in receipt of the profits of the same.

And your orator further shows unto your Honors, as it is informed and believes, that since the date of said Letters Patent, the defendants herein named, well knowing all the facts hereinbefore set forth, and against the will of your orator, and in violation of your orator's rights, have been and are now jointly infringing said Letters Patent within the District aforesaid, and elsewhere within the United States, by constructing or causing to be constructed, and by using and causing to be used, looms for weaving pile fabrics, each of which contains the invention described and claimed in the said Letters Patent, all of which acts and doings are contrary to



equity and good conscience, and tend to the manifest injury of your orator in the premises.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that the defendant may be decreed to account for and pay over the income or profits thus unlawfully derived from the violation of your orator's rights, and be restrained from any further violation of said rights, your orator prays that your Honors may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining the said defendants, their clerks, attorneys, agents, servants and workmen from any further construction, sale or use in any manner of said patent improvement, or any part thereof, in violation of your orator's rights as aforesaid, and that the material now in possession or use of the said defendants may be destroyed or delivered up to your orator for that purpose.

And that your Honors, upon the rendering of the decree above prayed, may assess or cause to be assessed, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orator has sustained by reason of such infringement, and that your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendants as herein set forth.

And your orator further prays that a provisional or preliminary injunction be issued restraining the said defendants from any further infringement of said Letters Patent pending this cause, and for such other and further relief as the equity of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Elias S. Higgins, Henry M. Brooks, and Eugene Higgins, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

BROWN & JONES,

Solicitors for Complainant and of Counsel.

WEBSTER LOOM COMPANY,

by WM. G. SMITH, President.

UNITED STATES OF AMERICA, }  
Southern District of New York. } ss.

On this 19th day of August, 1889, before me personally appeared Wm. G. Smith, the President of the Webster Loom Company, the complainant above named, who being by me duly affirmed, deposes and says, that he is

the President of the Webster Loom Company and familiar with its business, and that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

WM. G. SMITH.

Affirmed and subscribed before me, this 19th day of August, 1889.

[SEAL.]

ANTHONY GREF, Notary Public, Kings County.

Certificate filed in N. Y. Co.

## FORM II.—DEMURRER.

*Circuit Court of the United States for the Southern District of New York.*

JOHN STYLES

against

ROBERT ROE and RICHARD DOE

} In Equity.

The demurrer of the above-named defendant Robert Roe to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill. And for causes of demurrer sheweth,

I. That it appeareth by the plaintiff's own showing by the said bill, that he is not entitled to the relief prayed by the bill against this defendant.

II. That it appears by the said bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto. And in particular it appears that the said Richard Doe has been duly adjudicated a bankrupt, and that Henry Brown has been duly appointed assignee of his estate, and that it appears by the said bill that said Henry Brown as assignee as aforesaid is a necessary party to the said bill; but that said Henry Brown is not made a party thereto.

III. That the said bill is exhibited against these defendants, and against several others defendants to the said bill, for several and distinct and independent matters and causes which have no relation to each other, and in which or in the greater part of which this defendant is in no way interested or concerned, and ought not to be implicated.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And he prays the judgment of this Honorable Court, whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

HENRY JONES,

Solicitor and of Counsel for Defendant Robert Roe,  
111 Broadway, New York.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

HENRY JONES,

Of Counsel for Defendant Robert Roe.

New York, August 9, 1889.

STATE OF NEW YORK,  
City and County of New York, } ss.  
Southern District of New York }

Robert Roe, being duly sworn, deposes and says: I am one of the above-named defendants. The foregoing demurrer is not interposed for delay.

ROBERT ROE.

Sworn to before me this 9th day of August, 1889.

[SEAL.]

SYLVANUS BROWN,  
Notary Public, New York Co., N. Y.

### FORM III.—PLEA.

*In the Circuit Court of the United States for the Southern District of New York.*

Between JOHN STYLES, Plaintiff,  
and  
ROBERT ROE and RICHARD DOE, Defendants. } In Equity.

The plea of the above named defendant Richard Doe to the bill of complaint of the above named plaintiff.

I, the defendant Richard Doe, by protestation, not confessing or acknowledging all or any part of the matters or things in the said bill of complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say, that I am not the administrator of the estate of Jane Doe as in the said bill alleged, and that the administrator of said Jane Doe is one Robert Hereford, which said administrator ought to be made a party or parties to the said bill as I am advised; all which matters and things I aver to be true, and plead the same to the said bill, and humbly crave the judgment of this Honorable Court whether I ought to be compelled to make any further or other answer to the said bill.

HENRY JONES,

Solicitor and of Counsel for Defendant Richard Doe,  
111 Broadway, New York.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

New York, August 9, 1889.

HENRY JONES,  
Of Counsel for Defendant Richard Doe.

STATE OF NEW YORK,  
City and County of New York, } ss.  
Southern District of New York }

Richard Doe, being duly sworn, deposes and says: I am one of the above named defendants. The foregoing plea is true in point of fact, and is not interposed for delay.

RICHARD DOE.

Sworn to before me, this 9th day of August, 1889.

[SEAL.]

SYLVANUS BROWN,  
Notary Public, N. Y. C.

## FORM IV.—ANSWER.

*Circuit Court of the United States for the Southern District of New York.*

JOHN HALFORD AND RICHARD DAVIS }  
                                           *against*                                 } In Equity.  
                                           HENRY HAWES.

The answer of the above-named defendant to the bill of complaint of the above-named plaintiffs.

In answer to the said bill, I, Henry Hawes, say as follows:—

1. I admit that I was on the first day of June, 1864, seized in fee-simple of the premises in the first paragraph of the said bill mentioned. And I admit that the indenture in the said first paragraph of the said bill mentioned was of such date, and made between such parties as in the first said paragraph of the said bill alleged, and that the same was executed by me. I believe that the said indenture was not executed by Henry Baker in the said bill mentioned. I believe that the said indenture was of or to the purport and effect in the said first paragraph of the said bill in that behalf set forth; but for my greater certainty I crave to refer to the same when produced to this Honorable Court.

2. I do not know and cannot set forth as to my belief or otherwise, whether the said Henry Baker died on the seventh day of May, 1867, or when he died; or whether or not having by his will and whether or not dated the tenth day of January, 1867, or of what other date, devised to the plaintiffs and their heirs, all estates vested in him by way of mortgage, or appointed the plaintiffs to be his executors; nor whether the said will was or not on the first day of July, 1867, or when, in fact, proved by the plaintiffs in the Surrogate's Court for the city and county of New York, or how otherwise; nor whether the said plaintiffs thereby or in fact became, nor whether they now are, the legal personal representatives of the said Henry Baker; but I have no reason to doubt that the facts are as in that behalf alleged in the said bill.

3. The said Henry Baker was a bachelor, without any near relations, and for many years previously to the year 1864, and thenceforward to his death, he suffered from continual ill-health and infirmity. My mother, Sarah Hawes, was in the service of the said Henry Baker as housekeeper from the year 1855 down to the time of the death of the said Henry Baker, and was in continual attendance upon him; and the said Henry Baker frequently expressed to my said mother his gratitude for her attention to his comfort in that his illness.

4. I attained my age of twenty-one years in the year 1864. In the early part of that year my said mother applied to the said Henry Baker to advance me the sum of one thousand dollars to enable me to enter business, which he agreed to do on having the repayment thereof with interest secured by the said indenture of the first day of June, 1864.

5. In the month of May, 1864, the said Henry Baker wrote, signed, and sent to me a letter bearing no date, containing the words and figures following (that is to say): "All is arranged about the security you are to give

me. I hope I shall never have occasion to enforce it; and that nothing will compel me to change my intention of rewarding your mother and yourself for her long and faithful services to me,"—as by such letter when produced will appear.

6. I have never made any payments whatsoever on account of interest due on the said indenture, and I was never called upon to pay interest thereon by the said Henry Baker in his lifetime.

7. My said mother died on the twenty-seventh day of December, 1867.

8. Under the circumstances hereinbefore appearing I submit that nothing is due on the said indenture from me to the plaintiffs, whether as such alleged personal representatives or otherwise, but I admit that nothing has ever been paid on account of the principal money secured thereby.

9. I do not know, and cannot set forth, as to my belief or otherwise, whether the plaintiffs did on the seventh day of April, 1878, discover, but I admit that it is the fact, that I intend to pull down the said house in the said bill mentioned, and that I have advertised the bricks composing the same to be sold as building materials. I deny that it is true that I have entered into a contract with John Smithers or with any other person for the execution of the work of pulling down the same.

10. I admit that if the said house be pulled down, the said premises would be an insufficient security for the sum of one thousand dollars with interest thereon at the rate of five per centum per annum from the first day of June, 1864. But I submit that I have a right to pull down the said house, and to sell the bricks composing the same as building materials, and that the injunction awarded against me by this Honorable Court on the sixteenth day of April, 1878, ought to be dissolved, and that the said bill ought to be dismissed with costs.

HENRY HAWES.

ROBERT JONES,

Solicitor for Henry Hawes,

111 Broadway, New York.

### DEFENDANT'S OATH TO ANSWER.

STATE OF NEW YORK,  
City and County of New York, }  
Southern District of New York. }

Henry Hawes, being duly sworn, deposes and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

HENRY HAWES.

Sworn to before me this 20th day of July, 1875.

SYLVANUS BROWN,

Notary Public, New York County.

[SEAL.]

## FORM V.—BILLS OF REVIVOR.

*United States Circuit Court, Southern District of New York.***THE WEBSTER LOOM COMPANY***against***EMMA L. HIGGINS, EUGENE HIGGINS and JOSEPHINE BROOKS,  
as Executors of the last Will and Testament of ELIAS S.  
HIGGINS, Deceased,****and****JULES REYNAL and JOHN H. HIGGINS, surviving trustees, and  
NATHALIE FLORENCE REYNAL, residuary legatee under the  
last Will and Testament of NATHANIEL D. HIGGINS, de-  
ceased.**} **In Equity.***To the Honorable the Judges of the Circuit Court of the United States for  
the Southern District of New York :—*

The Webster Loom Company, a Corporation organized under and pursuant to the Laws of the State of New York, and having its principal place of business in the City of New York in said State, brings this its bill of revivor against Emma L. Higgins, Eugene Higgins and Josephine Brooks, as Executors of the last Will and Testament of Elias S. Higgins, deceased, and Jules Reynal and John H. Higgins, surviving trustees,—and Nathalie Florence Reynal, residuary legatee under the last Will and Testament of Nathaniel D. Higgins, deceased. Said Emma L. Higgins, Josephine Brooks, Eugene Higgins, Jules Reynal, John H. Higgins, and Nathalie Florence Reynal being citizens of the State of New York and residents of the City of New York in said State; and thereupon your orator complains and says that on or about the 19th day of June, 1874, your orator filed a bill in equity in this Court against Elias S. Higgins and Nathaniel D. Higgins, alleging infringement by them of certain Letters Patent of the United States, which were Numbered No. 130,961 and dated August 27th, 1872, of which your orator was at that time, and is now, the owner.

That thereafter the said Elias S. Higgins and Nathaniel D. Higgins, having been duly served with the writ of subpoena, appeared by Counsel and filed their Answer to said Bill of Complaint, to which answer a replication was filed on the part of your orator.

That thereafter your orator proceeded to take proof in support of its said bill of complaint; and thereafter said defendants proceeded to take proofs in support of their said answer and in defense of said actions.

That thereafter said suit was brought to final hearing before the Honorable Hoyt H. Wheeler; that said Judge filed his decision on the 31st day of May, 1879, adjudging invalidity of the fifth claim of the patent—being the claim in suit—and dismissing the said bill of complaint, as by reference to said decision reported in 15 Blatchford, 446, will more fully and at large appear.

That thereafter your orator appealed to the Supreme Court of the United States from the decision of the Circuit Court for the Southern District of New York; that the said appeal was argued before said Supreme Court of the United States, and a decision made by said Court, the opinion being written by Mr. Justice Bradley, adjudging the validity of said patent and



that defendants had infringed the same, and remanded the cause to this Court, ordering a decree against said defendants restraining them from further infringement, and also granting a reference to a Master to ascertain and report damages and profits caused by said infringement,—all of which will more fully and at large appear by reference to said decision reported in 15 Otto, 580.

That thereafter the accounting in this cause was commenced and voluminous proofs taken.

That thereafter the Master filed his report awarding nominal damages to your orator, against said defendants.

That thereafter, on exceptions duly filed to said report, argument was had before His Honor Judge Shipman on motion to confirm said Master's report; that said Judge filed an opinion on the 26th day of July, 1889, recommitting said accounting to the Master for further action in accordance with the said opinion. That no order has yet been entered on Judge Shipman's decision.

That during the pendency of said accounting the defendant Nathaniel D. Higgins died, leaving a last Will and Testament, which on the 31st day of January, 1882, was admitted to probate in the Surrogate's Court of New York County, New York, and letters executory thereupon were on said 31st day of January, 1882, duly issued out of said Surrogate's Court unto Elias S. Higgins, Jules Reynal and John H. Higgins.

That said Will, after directing the payment of an inconsiderable percentage of the testator's estate as specified legacies to certain persons therein named, directed the said executors to hold in trust for the benefit of the testator's grandchildren, for a period of time that has not yet expired, the sum of One Million and Five hundred thousand dollars, and to pay the rest and residue of testator's estate unto his daughter Nathalie Florence Reynal.

That on the 31st day of December, 1888, said executors filed their final accounting in the office of the Surrogate of the County of New York, N. Y., whereby it appeared that they had paid said specific legacies, and that after paying to Nathalie F. Reynal aforesaid a sum amounting to between three and four millions of dollars, they still retained in trust for the benefit of said grandchildren of said testator the sum of One Million and Five hundred thousand dollars.

That said account was approved by said Surrogate and an order was entered in the Court of said Surrogate on the 31st day of December, 1888, discharging and releasing said Elias S. Higgins, Jules Reynal and John H. Higgins from their duties as executors under said last Will and Testament, but directing them to continue to hold said trust fund of One Million and Five hundred thousand dollars as directed in said last Will and Testament.

That said Elias S. Higgins, Jules Reynal and John H. Higgins thenceforth continued to so act as trustees under said Will as to said trust fund, and said Jules Reynal and John H. Higgins are now so acting.

That the aforesaid Elias S. Higgins died upon the 18th day of August, 1889, leaving a last Will and Testament, which on the 14th day of September, 1889, was admitted to probate in the Surrogate's Court of New York

County, New York, and letters executory thereupon were on said 14th day of September, 1889, duly issued out of said Surrogate's Court unto Emma L. Higgins, Eugene Higgins and Josephine Brooks, and still remain in full force and virtue.

Wherefore, your orator prays that the said cause may be revived by the decree of this Honorable Court, and that it may proceed to a decree in its favor in accordance with the prayer of the original bill of complaint herein.

Your orator further prays that a writ of subpoena may issue in due form of law, directed to the aforesaid defendants Emma L. Higgins, Eugene Higgins and Josephine Brooks, as Executrices and Executor of the Estate of Elias S. Higgins, deceased, and Jules Reynal and John H. Higgins as trustees, and Nathalie Florence Reynal as residuary legatee under the Will of Nathaniel D. Higgins, deceased, and requiring them to appear and show cause, if any they have, why this cause should not be revived; and if no cause shall be shown by said defendants why said suit should not be revived, that a decree be entered reviving said suit in favor of your orator.

And your orator will ever pray, etc.

WEBSTER LOOM COMPANY, by  
WM. G. SMITH, Prest.

BROWN & JONES,  
Solicitors and of Counsel for Complainant,  
5 Beekman Street, New York.

STATE OF NEW YORK,  
City and County of New York. } ss.

William G. Smith, being duly sworn, says that he resides in the City and County of New York, and is the President of the Webster Loom Company, the complainant herein; that he has read the foregoing bill of revivor and knows the contents thereof, and that the same is true of his own knowledge.

Deponent further says that the reason why this verification is not made by the complainant is, that it is a Corporation; that deponent is an officer of the same, to wit, President.

WM. G. SMITH

Sworn to before me this 3d day of December, 1889.

[SEAL.]

A. G. N. VERMILYE,  
Notary Public, N. Y. Co.

## FORM VI.—NOTICE OF TAKING TESTIMONY IN EQUITY.

*Circuit Court of the United States for the Southern District of New York.*

JOHN STILES, Complainant, )  
                  *against*                    ) In Equity.  
JOHN DOE, Defendant.

Notice is hereby given, that we shall proceed to take proofs for final hearing on the part of the complainant under the 67th Rule of the Supreme Court for courts in equity, as amended, or in accordance with the statutes in such case made and provided, and in pursuance of the rules

and practice of this Court, orally before Henry Roberts, an Examiner of this Court, or some other proper officer, under said statutes and rules, at Room 4, Number 206 Broadway, New York, on the 20th day of July, 1889, at 11 o'clock in the forenoon.

The names and residences of the witnesses who live at a greater distance from the place of trial than one hundred miles, whom it is intended to examine, are stated below.

You are invited to attend and cross-examine any witnesses produced. The examination will be adjourned from day to day, and to such time and place as may be required, without further notice.

BROWN & BLACK,  
Complainant's Solicitors,  
No. 206 Broadway, New York.

Dated New York City, July 1, 1889.  
TO FRANK FARWELL, ESQ.,  
Solicitor for Defendant.

*Names of Witnesses and Residences.*

John Smith, of Yonkers, New York.  
Henry Robinson, of Newark, New Jersey.

**FORM VII.—NOTICE OF DEPOSITION UNDER REVISED STATUTES.**

*United States Circuit Court for the Northern District of New York.*

GEORGE H. BENJAMIN, Plaintiff,  
against

THE JOHN T. NOYE MANUFACTURING COMPANY, Defendant.

} In Equity.

Please take notice that the complainant herein will take the testimony of George H. Benjamin, F. Rudinger and George V. Hecker, all of whom reside at the City of New York, and State of New York, and others, each and all of whom reside more than one hundred (100) miles from the place of trial herein, and more than one hundred (100) miles from any place at which a Circuit Court of the United States for the Northern District of New York is appointed to be held by law, at the final hearing for use on behalf of the complainant, before Henry T. Brennan, Esq., a Notary Public in and for the City and County of New York, who is not of counsel nor interested in this cause, at the office of Brown & Jones, at No. 35 Wall Street, in the said City of New York, and State of New York, on the 4th day of January, 1892, at 11 o'clock A. M., and thereafter from day to day as the taking of the depositions may be adjourned; and such testimony will be so taken in accordance with the provisions of Sections 863, 864, and 865 of the Revised Statutes of the United States and the Equity Rules.

BROWN & JONES,  
Complainant's Solicitors,  
No. 35 Wall Street, New York.

Dated New York, December 28, 1891.  
TO JOHN ROE, ESQ., Defendant's Solicitor,  
No. 377 Main Street, Buffalo, New York.

## FORM VIII.—ORDER FOR DEDIMUS POTESTATEM.

At a stated term of the United States District Court held at the United States Court Building in the city of New York, for the Southern District of New York, on the 18th day of April, 1874. Present: the Honorable Samuel Blatchford, the District Judge.

THE UNITED STATES  
                   *vs.*  
 S. N. WOLFF et al. }

On reading and filing affidavit of plaintiff's attorney and notice of motion, with proof of due service thereof on attorneys for the defendant, Alphonse de Reisthal, who only has appeared herein, George Bliss, Esq., appearing for the plaintiff, and W. J. A. Fuller, Esq., for the defendant, Alphonse de Reisthal,

It is, on motion of George Bliss, Esq., United States Attorney, ordered that a *dedimus potestatem* be issued in this cause out of this court, directed to the United States Consul, and to such deputy or representative of said consul as may be authorized by him to act in his place and stead, at the following named places, respectively, viz: To E. P. Beauchamp, United States Consul at Aix-la-Chapelle (Aachen), Germany, and his deputy or representative; to W. P. Webster, United States Consul at Frankfort-on-the-Main, and his deputy or representative; to H. Kreisman, United States Consul at Berlin, Prussia, and his deputy or representative; to J. S. Stuart, United States Consul at Leipzig, German, and his deputy or representative; to Daniel McM. Gregg, United States Consul at Prague, Austria, and his deputy or representative; to S. H. M. Byers, United States Consul at Zurich, Switzerland, and his deputy or representative; to examine the following-named persons under oath as witnesses herein, viz: A. Amberg, and the person or persons composing the firm of A. Hirsch & Co., of Cassel, Germany; S. N. Wolff, of Neidheim, near Cassel, aforesaid; the person or persons composing the firm of Luttger Brothers, of Petersmuhle, near Solingen, Germany; Carl Aufermann, of Losenbach, near Liedenscheid, Germany; V. T. Pospichel, of Wiesenthal, Bohemia; and the person or persons composing the firm of Leopold Czech & Co., of Haida, Bohemia; the person or persons comprising the firm of E. Kreimer & Co., Berlin, Prussia; W. Wagner, Jr., of Plattenberg, Switzerland, and T. L. Lurman, and J. W. Maes, of Iserlohn, Germany.

It is further ordered that the examination above provided for shall take place during the months of July and August, 1874, and at such times within said months as is hereinafter designated.

It is further ordered that either party to this action shall have liberty to examine not only the witnesses herein named, but any other witnesses that either party may desire to examine at the aforesaid places of Aix-la-Chapelle, Frankfort-on-the-Main, Berlin, Leipzig, Prague, or Zurich, before either of the persons herein authorized to take testimony; provided, however, that the names of said witnesses and their places of residence shall be given to the attorney of the opposite side in New York, before June 6, 1874, or such notice be given in Europe to the opposite counsel acting there for either party to this action, in either of the aforesaid places of

Aix-la-Chapelle, Frankfort-on-the-Main, Berlin, Leipzig, Prague, or Zurich, where such other witnesses are to be examined, two days before such examination.

It is further ordered that, prior to June 6, 1874, the attorneys for the respective parties shall give notice in New York, each to the other, of the names and European address, for the last week in June, 1874, of the counsel for the respective parties who are to take testimony under this commission.

It is further ordered that the examination of witnesses shall be had at the following places, in the following order, and not otherwise, viz.: First, at Aix-la-Chapelle, next at Frankfort-on-the-Main, next at Berlin, next at Leipzig, next at Prague, next at Zurich; that four weeks shall elapse between the examination of witnesses at Prague and Zurich; that the examination shall commence at Aix-la-Chapelle, on the 6th day of July, 1874, or within two days thereafter; and that no examination shall be had of witnesses at any place after the examination has been finished at that place, or the examination of witnesses commenced at another place.

It is further ordered that the counsel for the plaintiff shall have with him at any and all said examinations of said witnesses, or either of them, all the original invoices mentioned in the declaration herein, or copies or duplicates thereof, and which are in the possession of the plaintiff, and that counsel for defendant shall have full and free inspection thereof, and liberty to take copies of the same.

It is further ordered that all directions herein contained as to time, place, order, and manner of examination of said witnesses may be changed or modified by the written consent of the counsel for the respective parties in Europe or in New York.

It is further ordered that the examination of all witnesses under this commission shall be oral, or taken by question and answer, in the usual manner of taking oral depositions, by examination, cross-examination, and redirect examination; that the testimony given under such examination shall be reduced to writing, signed by the witnesses, and certified by the commissioners, respectively, and by them transmitted by mail to the clerk of this court at the city of New York, unless otherwise mutually agreed upon by said counsel for both parties.

It is further ordered that all testimony taken under the commission provided for herein, shall be taken subject to all legal objections at the trial of this action.

SAM. BLATCHFORD.

#### FORM IX.—LETTERS ROGATORY.

UNITED STATES OF AMERICA, }  
Southern District of New York. }

*The President of the United States of America to the President of*  
[SEAL] *the Court at S. Angelo dei Lombardie in the Kingdom of Italy,*  
GREETING:

Whereas a certain suit is pending in our Circuit Court for the Southern District of New York, in which Giovanni P. Riva, as administrator of the estate of Angelo di Nicola, deceased, is plaintiff, and the New York Cen-

tral and Hudson River Railroad Company is defendant, and it has been suggested to us, that justice cannot completely be done between the said parties, without the testimony of Grazia Di Ventuto, Antonio Torrello, and Maria Michela Torrello, all of whom reside at Bagnoli Irpino within your jurisdiction;

We therefore request you that in furtherance of justice you will by the proper and usual process of your Court, cause said Grazia Di Ventuto, Antonio Torrello, and Maria Michela Torrello to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place by you to be fixed, then and there to make answer on their oaths and affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and to be returned to us under cover addressed to the clerk of the Circuit Court of the United States for the Southern District of New York, at the City of New York and State of New York, in the United States of America, duly closed and sealed up together with these presents, and we shall be ready and willing to do the same for you in a similar case when required.

Witness, Hon. MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at the City of New York, the 24th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS, Clerk. [L. s.]

### FORM X.—MASTER'S WARRANT OR SUMMONS.

*Circuit Court of the United States for the Southern District of New York.*

JOHN DOE, Plaintiff,  
                    *against*  
RICHARD ROE, Defendant. } In Equity.

In pursuance of the authority contained in a decretal order made in this cause by the Honorable William J. Wallace, Circuit Judge, and the Honorable Nathaniel Shipman, District Judge, at a stated Term of this court held at the United States Court House in the City of New York on the 5th day of July, A. D. 1888, I, Benjamin Smith, one of the Masters of said Court, do hereby summon you, John Doe, complainant, and Richard Roe, defendant, to appear before me, the said Benjamin Smith, at my office at No. 206 Broadway, in the City and County of New York in the Southern District of New York, on the fourth day of January, A. D. 1889, at two o'clock in the afternoon, to attend a hearing before me, the said master, of the matters in reference in the said cause to be had by virtue of the decretal order aforesaid. And hereof fail not at your peril.

BENJAMIN SMITH, Master.

Dated the 28th day of December, 1888.

*Underwriting:* To take the account in the suit.

BENJAMIN SMITH, Master.

To JOHN DOE and RICHARD ROE.



**FORM XI.—NOTICE ACCOMPANYING DRAFT OF MASTER'S REPORT.***Circuit Court of the United States for the Southern District of New York.*

JOHN DOE, Complainant, }  
                                   *against*                    } In Equity.  
 RICHARD ROE, Defendant. }

SIRS: You are hereby notified that I have prepared the draft of my Report upon the matters referred to me as Master, by the Interlocutory Decree herein dated the 30th day of November, 1887, and that a copy of such Draft Report accompanies and is annexed to this notice and is herewith served upon you; you are also hereby notified that I shall sign and file said Draft Report as my Report herein, unless alterations are made by me therein, upon suggestions of counsel for either party hereto, and that I appoint the 26th day of February, 1889, at my office, Room 8, No. 10 Wall Street, in the City and County of New York, at 11 o'clock in the forenoon of said day, for counsel for either party hereto to present to me any suggestions of amendments to or alterations of said Draft Report, and to file with me written objections or exceptions thereto, if any they have to the same.

Yours, &amp;c.,

BENJAMIN SMITH, Master.

Dated New York, February 21, 1889.

To Messrs. BROWN &amp; BLACK, Complainant's Solicitors,

1 Broadway; and

ROBERT JONES, Defendant's Solicitor,

111 Broadway, New York City.

**FORM XII.—ORDER APPOINTING REFEREE TO TRY ACTION AT COMMON LAW.**

At the April Term of the United States Circuit Court for the Southern District of New York, held in New York City, at the Post Office, on April 24, 1888. Present: HON. WILLIAM J. WALLACE, Circuit Judge.

ANDREW BROWN, Plaintiff,  
                                   *against*  
 THE NEW YORK, LAKE ERIE, AND WESTERN  
 RAILROAD COMPANY, Defendant. }

On reading and filing the annexed stipulation, it is

Ordered that the above-entitled action be referred to Hamilton Cole, Esq., as sole Referee, to hear and determine all the issues thereof, and that judgment may be entered upon his report as such Referee with the same force and effect as upon a hearing and decision of the Court.

And it is further ordered that the said Referee shall make special findings of fact herein, and that said findings when adopted by the Court shall have the same force and effect as and shall be deemed findings of the Court.

It is further ordered that this action and the issues therein may be tried and determined by the Court without the intervention of a jury.

It is further ordered that judgment shall not be entered herein until

after ten days' notice of the filing of the report of the Referee, and of the judgment proposed to be entered thereon.

It is further ordered that the Referee's fees be taxed as costs herein.

(Signed)

WM. J. WALLACE.

(A copy.)

[SEAL]

TIMOTHY GRIFFITH, Clerk.

### FORM XIII.—STIPULATION FOR REFERENCE OF ACTION AT COMMON LAW.

*U. S. Circuit Court for the Southern District of New York.*

ANDREW BROWN, Plaintiff,

against

THE NEW YORK, LAKE ERIE AND WESTERN  
RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed that the above-entitled action be referred to Hamilton Cole, Esq., as sole Referee, to hear and determine all the issues thereof, and that judgment may be entered upon his report as such Referee, with the same force and effect as upon a hearing and decision of the Court.

And it is further stipulated and agreed that the said Referee shall make special findings of fact herein, and that said findings when adopted by the Court shall have the same force and effect as and shall be deemed findings of the Court.

It is further stipulated and agreed by and between the parties hereto, that this action and the issues therein may be tried and determined by the Court without the intervention of a jury, and a jury is hereby waived.

It is further stipulated and agreed that judgment shall not be entered herein until after ten days' notice of the filing of the report of the Referee, and of the judgment proposed to be entered thereon.

It is further stipulated and agreed that the Referee's fees shall be taxed as costs herein.

Dated New York, April 23, 1888.

C. L. ATTERBURY, Atty. for Plaintiff.

BUCHANAN & STEELE, Defendant's Attorneys.

### FORM XIV.—WRIT OF HABEAS CORPUS.

*The President of the United States of America to Martin T. McMahon,  
Marshal of the United States for the Southern District of New York,  
GREETING:*

We command you, That you have the body of John Doe, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said John Doe shall be called or charged, before a stated term of the Circuit Court of the United States for the Southern District of New York, to be held in the Post-Office Building in the city and county and State of New York, on the ninth day of December, 1889, to do and receive what shall then and there

be considered concerning said John Doe, and have you then and there this writ.

Witness, Hon. MELVILLE W. FULLER, Chief Justice of the United States, the fifth day of December, one thousand eight hundred and eighty-nine.

JOHN A. SHIELDS, Clerk. [L. s.]

ROBERT JONES, Petitioner's Attorney,

206 & 208 Broadway, New York.

*Indorsement:* Let the within writ issue.

E. HENRY LACOMBE, Circuit Judge.

#### FORM XV.—ORDER ADJUDGING PARTY GUILTY OF CONTEMPT.

[Copied from *Fischer v. Hayes*, 6 Fed. R. 66.]

[TITLE.]

A motion for attachment for contempt herein having come on for further hearing on the question of punishment or terms, on this thirteenth day of February, 1880, and Charles F. Blake, Esq., having been heard for the motion, and J. H. Whitelegge, Esq., opposed; now, therefore, it is hereby ordered and decreed, that the defendant is adjudged to have committed the contempt alleged, and that he pay, as a fine therefor, the amount of all costs, charges, and disbursements, whatsoever suffered, borne, or incurred, by the complainant by reason of, or on account of, the said motion, and that the question of the amount of said fine be submitted to this Court on affidavits, and without argument, as follows: The complainant to serve his affidavits on the solicitor for the defendant on or before Friday, February 20th, 1880; that defendant serve his replying affidavits on counsel for complainant on or before Tuesday, February 24th, 1880; and that complainant have the right to reply; and that all affidavits be filed on or before Friday, February 27th, 1880.

#### FORM XVI.—ORDER FINING DEFENDANT FOR CONTEMPT.

[Copied from *Fischer v. Hayes*, 6 Fed. R. 67.]

[TITLE.]

This motion having been heard, on the first day of August, 1879, on affidavits and argument by counsel for the respective parties, and thereupon an order having been duly made that it be referred to John A. Shields to ascertain the fact of said infringement, if the same be so, and report his finding to this court, and upon the coming in of the report of said referee, and hearing counsel for the respective parties, in support thereof and in opposition thereto, said report was confirmed; and it was then further ordered that the complainant file with the court, and serve copies on defendant, affidavits showing the expenses incurred in the prosecution of this second attachment for contempt; that defendant file and serve answering affidavits, and that complainant may reply thereto; and an amended order, and the affidavit of George Hayes, the defendant, executed on the twenty-sixth day of February, 1880, having been filed in reply to said complainant's affidavits, it is, upon consideration thereof, ordered

that the defendant pay into court the sum of \$522.49, as set forth in the affidavit of Baron Higham, executed herein on the sixteenth day of February, 1880, and the further sum of \$867.50, as set forth in the affidavit of Valentine Fisher, executed herein on the twentieth of February, 1880, amounting altogether to the sum of \$1,389.99, as a fine for said second contempt, within thirty days from the date of the entry of this order, to wit, the twelfth day of April, 1880; and that if not paid, the defendant stand committed till it be paid, and that, when paid, it be paid over to the plaintiff in reimbursement.

**FORM XVII.—PETITION FOR REMOVAL FROM A STATE COURT  
TO A CIRCUIT COURT OF THE UNITED STATES.**

*Supreme Court, County of New York.*

JOHN STILES, Plaintiff, }  
                    *against* }  
ROBERT ROE, Defendant. }

*To the Honorable the Supreme Court of the State of New York, held in and  
for the County of New York: —*

Your petitioner respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs. That the controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different States, and that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of the suit, and still is, a resident of and a citizen of the city of Boston, in the County of Middlesex, in the State of Massachusetts, and a non-resident of the State of New York, and that the plaintiff, John Stiles, was then, and still is, a resident and citizen of the city, county, and State of New York.

And your petitioner offers herewith a good and sufficient surety for his entering in the Circuit Court of the United States for the Southern District of New York, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Southern District of New York; and he will ever pray.

ROBERT ROE,

WHITE & BLACK, Petitioner's Attorneys,  
206 Broadway, New York, N. Y.

*City and County of New York.*

Robert Roe deposes and says: I am the above-named petitioner. The foregoing petition is true to my own knowledge, except as to the matters

therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. ROBERT ROE

Sworn to before me, this 18th day of December 1889,

SYLVANUS BROWN, Notary Public, [L. S.]

New York County.

On this 18th day of December, 1889, in the City and County of New York, before me, a notary public, in and for the City and County of New York, personally appeared Robert Roe, to me known to be the individual who executed the foregoing petition, and then and there acknowledged to me that he had executed the same.

SYLVANUS BROWN, Notary Public, [L. S.]

New York County.

### FORM XVIII.—BOND ON REMOVAL.

Know all Men by these Presents, that Robert Roe of Boston, Massachusetts, as principal, and Peter Kenny, as surety, are holden and stand firmly bound unto John Stiles in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said John Stiles, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally firmly by these presents.

Upon condition nevertheless that, whereas the said Robert Roe has petitioned the Supreme Court of the State of New York, held in and for the County of New York, for the removal of a certain cause therein pending, wherein the said John Stiles is plaintiff, and the said Robert Roe is defendant, to the Circuit Court of the United States in and for the Southern District of New York:

Now, if the said Robert Roe shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof the said Robert Roe and Peter Kenny have hereunto set their hands and seals this 18th day of December, A. D. 1889.

ROBERT ROE. [L. S.]

PETER KENNY. [L. S.]

*City and County of New York.*

Peter Kenny, being duly sworn, deposes and says: I reside in the City, County, and State of New York, and am a freeholder therein; and am worth the sum of two thousand dollars over and above all property exempt from sale on execution. PETER KENNY.

Sworn to before me, this 18th day of December, 1889.

[SEAL.]

SYLVANUS BROWN,

Notary Public, New York County.

On this 18th day of December, 1889, in the City and County of New York, before me, a notary public in and for the City and County of New York, personally appeared the above-named Robert Roe, of Boston, Massachu-

setts, and Peter Kenny, of the City and County of New York, both of whom are to me known, and known to me to be the individuals described in and who executed the foregoing instrument, and then and there each of them severally acknowledged that he had executed the foregoing bond.

[SEAL]

SYLVANUS BROWN,

Notary Public, New York County.

Approved by

GEORGE C. BARRETT, J. S. 'C.

### FORM XIX.—FINAL RECORD IN EQUITY.

*Circuit Court of the United States, Southern District of New York.*

JOHN STILES  
against } In Equity.  
ROBERT ROE }

The complainant in the above entitled cause filed his bill of complaint, which is hereunto annexed, on 2d day of January, one thousand eight hundred and eighty-seven, and the writ of subpoena was thereupon issued, and returned personally served.

An appearance was duly entered for the defendant by Henry Smith, his solicitor, and on the first Monday of March thereafter an answer to said bill of complaint was filed, the same being hereto annexed.

On the first Monday of April thereafter, the complainant filed a replication, the same being hereto annexed.

On the 19th day of March, one thousand eight hundred and eighty-seven, an order of the Court granting to the complainant a preliminary injunction as prayed for in the bill of complaint was filed and entered, which said order is hereunto annexed.

Testimony was thereafter taken by the respective parties, and filed in the clerk's office of the said Circuit Court.

Afterwards, and at the October term of 1888 of said Court, present the Honorable Nathaniel D. Shipman, District Judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the 8d day of November, one thousand eight hundred and eighty-eight, a decree of said Court was filed and entered in favor of the complainant, by which it was adjudged that a perpetual injunction should issue against the defendant, and that an accounting be had before John A. Shields, Master of said Court; the said order being hereto annexed.

On the 9th day of June, one thousand eight hundred and eighty-nine, the said Master filed his report, upon which, and on the 11th day of October, one thousand eight hundred and eighty-nine, the said court caused its final decree to be entered herein, the same being hereto annexed.

And the costs having been taxed by the clerk at seven hundred and fifty dollars, the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said John Stiles recover of said Robert Roe the sum of two thousand dollars as adjudged in said final decree, together with the further sum of seven hundred and fifty dollars, the cost and charges as



taxed, making in the aggregate the sum of two thousand seven hundred and fifty dollars.

Signed and enrolled this 15th day of November, A. D. 1889.

JOHN A. SHIELDS, Clerk.

### FORM XX.—BILL OF EXCEPTIONS.

[Copied from *Heidritter v. Elizabeth Oil Cloth Co.*, 113 U. S. 294.]

*Circuit Court of the United States, District of New Jersey.*

AUGUST HEIDRITTER	}	In Ejectment.
vs.		
THE ELIZABETH OIL CLOTH COMPANY.		

Be it remembered that afterward, to wit, on the fifth day of May, in the year of our Lord one thousand eight hundred and eighty, at a stated term of the said court begun and holden in Trenton in and for the district of New Jersey, before his Honor, John T. Nixon, District Judge, the issue joined in the above stated cause between the said parties (*pro ut* the pleadings) came on to be tried before the said judge without the intervention of a jury, the parties aforesaid by their counsel having, according to the statute in such case made and provided, waived a jury; the plaintiff being represented by Edward A. Day, Esquire, his attorney, and William H. Corbin, Esquire, of counsel; and the defendant by William R. Wilson, Esquire, its attorney, and Benjamin Williamson, J. Tredwell Richards, and Alfred S. Brown, of counsel; and upon the trial of that issue the attorneys of the said August Heidritter, plaintiff, to maintain and prove the said issue on his part (it first having been admitted by the counsel for the said defendant that the erection of the building upon the premises in controversy, and for the erection of which the mechanic's lienors mentioned in plaintiff's bill of particulars supplied materials, was commenced June 25th, 1872) offered in evidence the following deeds and records, viz:—

An exemplified copy of the following deed, viz: Edward G. Brown and wife to Charles L. Sicher, war. deed, dated August 20, 1872; received August 20, 1872; in Book 78 of Deeds for Union Co., pp. 10, etc., conveys premises in controversy.

An exemplified copy of the judgment roll in the following cases, viz: In the office of the clerk of the County of Union; August Heidritter v. Charles L. Sicher, builder and owner; lien claim and judgment; (*pro ut* the same.)

An exemplified copy of the judgment roll in the following case, viz: In the office of the clerk of the County of Union; Ferdinand Blancke and others, partners, etc., as Ferdinand Blancke v. Charles L. Sicher, builder and owner; lien, claim, and judgment; (*pro ut* the same.)

An exemplified copy of the following deed, viz: Seth B. Ryder, sheriff, to August Heidritter, deed dated September 24th, 1878; received December 1, 1878; in Book 84 of Deeds for Union Co., p. 582, conveys the premises in controversy under and by virtue of the judgment and executions in the two cases last above named; (*pro ut* the same.)

Also certain other deeds and records by which a four-thirteenths inter-

est in the premises in question was conveyed away by the said plaintiff, and subsequently thereafter reconveyed to him.

And thereupon said plaintiff rested his case.

Whereupon the attorneys for the said The Elizabeth Oil/Cloth Company, the defendant, to maintain and prove the said issue on its part, called as a witness John C. Baily, who, being duly sworn, testified among other things as follows: —

“I was United States deputy marshal for the district of New Jersey in 1878, under Samuel Plummer, United States marshal, and as such took possession of the premises in controversy, among other things, in the condemnation or forfeiture proceeding brought by the United States against Charles L. Sicher for illicit distilling, in February, 1878, and held such possession until the sale of the premises was made by the United States marshal to Edward G. Brown. While in possession of said premises, a gentleman came there whose name and appearance I cannot remember, and told me that he had a claim against the premises.”

Whereupon the counsel for the plaintiffs did then and there insist before the said judge that the said testimony should not be allowed, on the ground that the same was incompetent, irrelevant, and immaterial, and prayed the said court not to admit and allow the same; and the said judge did then and there allow and admit the said testimony to be introduced. Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that this bill of exceptions might be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And thereupon under the above ruling the witness further testified:

“I told the gentleman that the place for him to go and defend his claim was at Trenton, and told him also of the notice, viz.: the proclamation, which had been set up; I also published that notice in the Jersey City Times.

“I saw the same gentleman on the day of sale. He was with Mr. E. G. Brown, and I had conversation with them both there.”

And being cross-examined, said: —

“I remember that there was an announcement made at the marshal's sale in regard to certain lien claims on the premises. A paper relating to said claims was also served upon me. Mr. Alward appeared as the attorney for the lien claimants on that day.”

And thereupon the counsel for the defendant offered in evidence the following records, viz.: —

An exemplified copy of the following deed, viz.: Edward G. Brown and wife, to Charles L. Sicher, war. deed, dated August 20, 1872; received August 20, 1872; in Book 78 Deeds for Union Co., pp. 10, etc., conveys the premises in question.

The record in full of the decree and proceedings in the following case, viz.: U. S. District Court, District of New Jersey; the United States of America v. Eighty-nine Hogsheads of Molasses, etc.; (*pro ut* the same.)

And also an exemplified copy of the following deed, viz.: Samuel Plummer, U. S. marshal, to Edward G. Brown; deed dated May 29, 1873; received June 7, 1873; in Book 81 of Deeds for Union Co., pp. 801, etc.; con-

veys the premises in controversy under and by virtue of the decree and execution in the last above case; (*pro ut* the same.)

Whereupon the counsel for the said plaintiff then and there, and in each instance on the production thereof, interposed and insisted that the said evidence so offered to be given by the defendant, to wit, the decree and proceedings on forfeiture and the deed of the U. S. marshal to Brown thereunder, was not good or admissible at law upon the issue aforesaid, and ought not to be admitted in bar of plaintiff's title to the premises in controversy, for the reason that the plaintiff's title acquired under the mechanic's lien proceedings, as aforesaid, was by law prior to the title of the said defendants acquired under the said condemnation proceedings; also for the reason that the said condemnation proceedings in no wise condemned or forfeited the interests of the said lienors in said premises, and that their said interests had not been affected by said proceedings; also for the reason that by the several acts of Congress, and the supplements thereto under which said proceedings were had and maintained, only the right, title, and interest of the said Charles L. Sicher in the premises could have been seized and condemned to be forfeited, and that the interests of the said lienors could have in no wise been affected thereby, and also as only the interest of said Sicher in the premises had been seized and condemned, said Brown acquired only that interest at the marshal's sale, and took his title, therefore, subject to the mechanic's liens on the premises; also for the reason that as under the laws of New Jersey the title of the said plaintiff to the premises upon the sale to him by the sheriff of Union County reverted back to the date of the commencement of the buildings, viz.: June 25, 1872, long prior to the time when the business of distilling was carried on by the said Sicher on the premises, and long prior to the time when the United States acquired its lien thereto, the said condemnation proceedings were ineffectual to cut off or affect said plaintiff's title; also for the reason that by the acts of Congress, and the supplements thereto, under which said proceedings were had, only the right, title, and interest of Charles L. Sicher in the premises, and the right, title, and interest of every person who knowingly suffered and permitted the business of a distillery to be there carried on, or who connived at the same, could be forfeited to the United States, and no proof has been made, either in the condemnation proceedings or in the trial of this cause, that the lienors had knowingly suffered and permitted the business of a distillery to be carried on the premises, or that they had connived at the same, and therefore that the interests of such lienors had not been forfeited to the United States and were not affected by the decree; also for the reason that the district court never had jurisdiction to pronounce the said decree in that the United States internal revenue collector had not seized the said premises prior to the filing of the information; also for the reason that the information did not pronounce in distinct articles the causes of forfeiture, and did not aver that the same were contrary to the form of the statutes in such case made and provided, and that the allegations therein did not conform strictly to the statutes under which the proceedings were had, and therefore the said decree was void and no title could be acquired thereunder; also for the reason that the said decree was void in that the court in said

proceedings did not have proof made of the allegations in the libel of information, and therefore said Brown acquired no title to the premises in question, and also on the ground that by the terms of said deed all that said Brown acquired was the right, title, and interest of said Sicher of, in, and to the premises in controversy, and therefore took the same subject to said mechanic's liens.

But his honor, the said judge, held and affirmed that the said evidence so offered to be given by the defendant, as aforesaid, was good and admissible in law, and thereupon the same was read and given in evidence. To which ruling of his honor, the said judge, the plaintiff then and there prayed a bill of exceptions, and his honor, the said justice, sealed the exception accordingly.

JNO. T. NIXON, J. [L. S.]

And thereupon the said defendant, further to prove and maintain the said issue on its part, offered in evidence certain records and mesne conveyances by which the title to the premises in controversy passed from said Brown and became finally vested in the said defendant; and thereupon the said defendant, further to prove and maintain the said issue on its part, called as a witness —

EDWARD G. BROWN, who, being duly sworn, testified, among other things, as follows:

"I have heard the testimony of the witness, John C. Bailey, in reference to the gentleman who was present with me at the marshal's sale; that gentleman was Frederick L. Heidritter, a son of the plaintiff."

Whereupon the counsel for the plaintiff then and there objected to the admission of the said testimony, for the reason that the same was incompetent, immaterial, and irrelevant, and the said judge did then and there allow and admit the said testimony to be introduced.

Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

Thereupon, under the above ruling, this witness further testified, and being cross-examined, said: —

"I remember a paper being read at the sale; Mr. Alward was present; the paper was in regard to certain lien claims on the seized premises; also had a conversation with said Frederick L. Heidritter in relation to the liens; I knew at the time I purchased the premises, at said sale, of the existence of the liens."

And thereupon the defendant, further to prove and maintain the issue on its part, called —

JAMES RAY, who, being duly sworn, testified, among other things, as follows: —

"I am a government storekeeper, and remember the seizure of the premises in controversy. I saw Mr. Frederick L. Heidritter at the distillery shortly after the seizure."

Whereupon the counsel for plaintiff did then and there object to the admission of the testimony, and insisted that the same be not allowed in evidence, for the reason that it was incompetent, immaterial, and irrele-

Whereupon the counsel for the said plaintiff did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it was sealed accordingly.

Thereupon, under the above ruling, the witness testified further, as follows: —

**"That paper was the same as was read at the sale."**

**FREDERICK L. HEIDRITTER, who, being duly sworn, among other things, said:—**

Whereupon the counsel for the plaintiff did then and there interpose and object to the admission of said testimony, for the reason that the same was immaterial and irrelevant, and the said judge did then and there allow and admit the said testimony to be introduced.

JNO. T. NIXON, J. [L. S.]

**"The building seized was the same for which the materials were supplied by my father, and mentioned in the lien claims."**

Indorsed) United States Circuit Court, District of New Jersey, August  
Heidritter v. The Elizabeth Oil Cloth Company. In ejectment. Bill  
of Exceptions. EDWARD A. DAY. Filed May 5, 1880. J. D. OLIPHANT,  
Clerk.

***Circuit Court of the United States for the Southern District of New York.***

The above named plaintiff, John Doe, conceiving himself aggrieved by the order entered on December 3, 1889, in the above entitled proceeding, doth hereby appeal from said order to the Supreme Court of the United

States, and he prays that this his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT JONES,

Attorney for Plaintiff and Appellant John Doe,  
206 & 208 Broadway, New York, N. Y.

New York, December 17, 1889.

And now, to wit: On December 18th, 1889; it is ordered that the appeal be allowed as prayed for.

E. HENRY LACOMBE, Circuit Judge.

### FORM XXII.—CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

To *Richard Roe*, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and ninety, pursuant to an appeal, filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein John Doe is appellant and Richard Roe is respondent, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Hon. MELVILLE W. FULLER, Chief Justice of the United States, this 18th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

E. HENRY LACOMBE, Circuit Judge.

### FORM XXIII.—SUPERSEDEAS BOND.

*Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.*

JOHN DOE, Appellant,  
                    *against*  
RICHARD ROE, Respondent. }

Know all men by these presents, That we, John Doe and George Palliser, both of the city, county, and State of New York, are held and firmly bound unto the above named Richard Roe in the sum of two hundred and fifty dollars, to be paid to the said Richard Roe, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-nine. Whereas, the above named John Doe has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit, by the Judge of the Circuit Court of the United States, for the Southern District of New York:

Now, therefore, the condition of this obligation is such, that if the above named John Doe shall prosecute said appeal to effect and answer all dam-



ages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN DOE. [L. S.]

GEORGE PALLISER. [L. S.]

Sealed and delivered, and taken and acknowledged, this 18th day of December, 1889, before me,

JOHN A. SHIELDS, U. S. Commissioner.

Approved by

E. HENRY LACOMBE, Circuit Judge.

**FORM XXIV.—WRIT OF ERROR FROM SUPREME COURT TO CIRCUIT COURT.**

UNITED STATES OF AMERICA, ss.

*The President of the United States, To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York,*  
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between John Stiles, plaintiff, and Richard Roe, defendant, a manifest error hath happened, to the great damage of the said defendant, Richard Roe, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the said Supreme Court, the 19th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES HALL MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

SAMUEL A. BLATCHFORD, Justice.

**FORM XXV.—WRIT OF ERROR FROM SUPREME COURT TO CIRCUIT COURT OF APPEALS.**

UNITED STATES OF AMERICA, ss.

*THE PRESIDENT OF THE UNITED STATES, To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit,*  
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Dominick Amato, plaintiff, and The North-

ern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said defendant, the Northern Pacific Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the said Supreme Court, the twentieth day of February, in the year of our Lord one thousand eight hundred and ninety-two.

(Signed)

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

(Signed)

SAMUEL BLATCHFORD,

Associate Justice of the Supreme Court of the United States.

February 20, 1892.

**FORM XXVI.—WRIT OF ERROR FROM CIRCUIT COURT OF APPEALS TO CIRCUIT COURT.**

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *To the Judges of the Circuit Court of the United States for the Southern District of New York*, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Dominick Amato, plaintiff, and the Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as is said and appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Second Circuit, at the court rooms of said court in the Post-office building in the city of New York, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the twentieth day of August next, that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 27th day of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

(Signed) JOHN A. SHIELDS,  
 [Seal of U. S. Circuit Clerk of the Circuit Court of Appeals for  
 Court of Appeals.] the United States of America, for the  
 Second Circuit.

The foregoing writ is hereby allowed.

(Signed) E. HENRY LACOMBE.

### FORM XXVII.—CERTIFICATE BY CLERK TO TRANSCRIPT.

UNITED STATES OF AMERICA, } ss.  
 Southern District of New York. }

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of — —, plaintiff in error, against — —, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this — day of —, in the year of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[Seal of U. S. Circuit Court.]

— —, Clerk.

### FORM XXVIII.—CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.

*To Dominick Amato, GREETING:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein the Northern Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable SAMUEL BLATCHFORD, Associate Justice of the Supreme Court of the United States, this twentieth (20th) day of February, in the year of our Lord one thousand eight hundred and ninety-two.

(Signed) SAMUEL BLATCHFORD,  
 Associate Justice of the Supreme Court of the United States.

**FORM XXIX.—CITATION TO CIRCUIT COURT OF APPEALS ON  
WRIT OF ERROR.**

**UNITED STATES OF AMERICA, ss.**

*To Dominick Amato, GREETING:*

You are hereby cited and admonished to be and appear, at a term of the United States Circuit Court of Appeal for the Second Circuit, to be holden in the city of New York on the twentieth day of August, eighteen hundred and ninety-one, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the Northern Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

(Signed)

**E. HENRY LACOMBE.**

Dated, July 25th, 1891.

**FORM XXX.—CERTIFICATE BY CLERK UNDER SUPREME COURT  
RULE 9.**

*United States Circuit Court of Appeals for the Second Circuit.*

NORTHERN PACIFIC RAILROAD COMPANY,	}
Plaintiff in Error,	
<i>against</i>	
DOMINICK AMATO, Defendant in Error.	

UNITED STATES OF AMERICA,	}	ss.
Second Circuit,		
City of New York.		

I, John A. Shields, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify, that on the 25th day of January, 1892, an order was entered herein by the Circuit Court of Appeals for the Second District, directing a mandate to issue to the Circuit Court of the United States for the Southern District of New York, affirming a judgment of said Circuit Court entered in the Clerk's office of said Court on the 28th day of May, 1891; and that on the 28th day of January, 1892, a writ of error for the review of said order by the Supreme Court of the United States was duly sued out by the Northern Pacific Railroad Company, and allowed by the Honorable E. Henry Lacombe, Circuit Judge, and issued from the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, which writ of error was returnable in the Supreme Court of the United States on February 25th, 1892; that on or about the same day a bond as security for the costs upon said writ of error and a citation for the said return day, were duly approved and signed by the said Circuit Judge, which writ of error, citation, and bond were duly served on the attorney for the defendant in error on January 29th, 1892.

In testimony whereof, I have caused the seal of the said Court to be here-

unto affixed, at the City of New York, in the Second Circuit, this 27th day of February, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the said United States the one hundred and sixteenth.

JOHN A. SHIELDS, Clerk.

FORM XXXI.—WRIT OF ERROR TO STATE COURTS.

UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *To the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts*, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court of the Commonwealth of Massachusetts before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Doe and Richard Roe, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Richard Roe, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the — day of — next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the said Supreme Court, the 18th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES HALL MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

HORACE GRAY, Justice.

**FORM XXXII.—ASSIGNMENT OF ERRORS.***The Supreme Court of the United States.*

**In the Matter of the Petition of JOHN STILES, Appellant.**

**ASSIGNMENT OF ERRORS.** Afterwards, to wit, on the third Friday of January in the year of our Lord, eighteen hundred and ninety, at the October term for eighteen hundred and eighty-nine, of the Supreme Court of the United States, at the Capitol, in the City of Washington and District of Columbia, comes the said John Stiles, by Robert Jones, his attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:—

**I.** That the matters charged in the complaint against John Stiles do not constitute a crime by the common law or under any Statute of the United States.

**II.** That the matters testimony tending to prove which was given before John A. Shields, United States Commissioner, in the above entitled matter, do not constitute a crime by the common law or under any Statute of the United States.

**III.** That the matters charged as a crime against John Stiles, as appears by the testimony before John A. Shields, United States Commissioner, occurred and were committed, if they ever occurred or were committed, within the Southern District of New York, and not within the District of Connecticut; and that by the Sixth Amendment to the Constitution the United States, said John Stiles cannot be tried upon said charge in the District Court of the United States for the District of Connecticut.

**IV.** That the said Commissioner had no jurisdiction to issue a warrant for the arrest of John Stiles.

**V.** That the Marshal of the United States had no authority to arrest or detain John Stiles.

**VI.** That the Circuit Court of the United States for the Southern District of New York erred in not discharging the said John Stiles upon the return of the Writ of Habeas Corpus herein.

Wherefore the said John Stiles prays that the order of the said Circuit of the United States for the Southern District of New York be reversed, and the said Circuit Court of the United States for the Southern District of New York be ordered to enter an order directing the discharge of the said John Stiles from custody.

**ROBERT JONES,**  
Attorney for Appellant,  
206 & 208 Broadway, New York.



**FORM XXXIII.— PETITION FOR WRIT OF CERTIORARI TO CIRCUIT  
COURT OF APPEALS.**

[Copied from record, *Bleecker v. Steamship Kensington*, 175 U. S. 726.]

*To the Supreme Court of the United States of America.*

The Petition of **LIZZIE STEARNS BLEECKER** and  
**ELSIE L. BLEECKER** for a Writ of *Certio-*  
*rari*, directed to the Circuit Court of Ap-  
peals for the Second Circuit, to bring  
before the Supreme Court the case of **LIZ-**  
**ZIE STEARNS BLEECKER** and **ELSIE L.**  
**BLEECKER**, Libelants and Appellants,

*against*

The Steamship "**KENSINGTON**," her **BOILERS**,  
**ENGINES**, etc.; **THE INTERNATIONAL NAVIGA-**  
**TION COMPANY**,

Claimants and Appellants.

The said petitioners respectfully show to this court as follows:

I. Your petitioners were, at the time of the commencement of this suit, citizens and residents of the State of New Jersey, and the claimant was at that time a foreign corporation, duly organized and existing under the laws of the State of New Jersey.

II. On or about the 9th day of December, 1897, the said The International Navigation Company entered into a contract with the libelants and petitioners herein for a valuable consideration to them paid by the libelants, whereby it agreed to and with your petitioners to convey and transport the libelants from the Port of Antwerp, in the Kingdom of Belgium, to the Port of New York, in the United States of America, by the said steamship "*Kensington*," and by said steamship to carry and transport with safety to said Port of New York, and there deliver to the libelants, in good order and condition, the personal luggage or baggage of the libelants.

III. On or about the 11th day of December, 1897, the libelants took passage at Antwerp for New York upon said steamship "*Kensington*," then lying at said Antwerp, bound for said Port of New York, and, in pursuance of the terms of the contract between them and on or about said day last mentioned, delivered to the said The International Navigation Company, on board of said steamship at Antwerp, the wearing apparel and other personal baggage of libelants, to be transported as aforesaid by said steamship to said Port of New York, and there delivered to the libelants in good order and condition.

IV. Early in December, 1897, your petitioners engaged their passage from the claimant herein in Paris, France. At that time they paid part of their passage money, and received in return either a receipt or a ticket, which was not good until the balance of the purchase money was paid in Antwerp. In Antwerp they paid the balance of the purchase money. Neither of them read the ticket, and the day that they went on board the steamer they gave it up to the paymaster (Mrs. Bleecker, p. 15, fols. 57, 58; p. 21, fols. 83, 84; Miss Bleecker, p. 26, fols. 101, 102).

Your petitioners received in Antwerp a receipt for their baggage, which

they also did not read, and which acknowledges the receipt of their baggage, "weight, contents and value unknown, and shipped by the Red Star Line Steamers, subject to the conditions contained in the Co.'s ticket and bill of lading. Red Star Line, Antwerp, December, 1897. Caisse" (p. 56, fol. 222). They were not asked concerning the value of their baggage by any agent of the ship or of the shipowners (p. 24, fol. 96). The ticket so far as is material is as follows:

"Paris, on the 2 Decr., 1897. This ticket is good for second-cabin passage of the persons named in the margin, viz, . . . by the British steamship 'Kensington' from Antwerp, on the 11th of December, 1897, at one o'clock P. M., unless prevented from unforeseen circumstances." . . . In minute type, much smaller than what preceded: "Notice to passengers. It is a condition upon which this ticket is granted, and is mutually agreed, for the consideration aforesaid, that: . . .

"(c) The shipowner or agent are not under any circumstances liable for loss, death, injury or delay to the passenger or his baggage, arising from the act of God, the public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not; perils of the seas, rivers or navigation; accident to or of machinery, boilers or steam; collisions, strikes, arrest or restraint of princes, courts of law, rulers or people, or from any act, neglect or default of the shipowner's servants, whether on board the steamer or not, or on board any other vessel belonging to the shipowner, either in matters aforesaid or otherwise howsoever. Neither the shipowner nor the agent is, under any circumstances, or for any cause whatever or however arising, liable to any amount exceeding two hundred and fifty francs for death, injury or delay of or to any passenger carried under this ticket. The shipowner will use all reasonable means to send the steamer to sea in a seaworthy state, and well-found, but does not warrant her seaworthiness.

"(d) The shipowner or agent shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of two hundred and fifty francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the owner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading in use from the port of departure, etc. All questions arising hereunder are to be settled according to Belgian Law."

V. Said steamship sailed from said port of Antwerp with your petitioners and their baggage on board on or about the 11th day of December, 1897, for the port of New York, and where said steamship arrived in safety on or about the 23d day of December, 1897, but owing to the careless, negligent, unusual, insufficient and improper manner in which your petitioners' baggage was stored, and the careless, negligent and insufficient manner in which other merchandise in said steamship was stored, and the want of proper care on the part of the master of said steamship, his officers and crew, and persons employed by him or them, the said personal baggage of your petitioners, which was of the value of four thousand dollars (\$4,000), was in great part utterly ruined, whereby your petitioners were severally damaged in the sum of two thousand dollars (\$2,000).

VI. On the 9th of February, 1898, the libel herein was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, and on the same day the above-named steamship was levied upon.

VII. The claimant The International Navigation Company interposed an answer admitting all of the matters alleged in the libel except that it agreed to transport the said luggage with safety and to deliver it in good order and condition except so far as that duty is to be implied from its engagement in the aforesaid ticket, and that the said baggage was damaged by reason of insufficient and improper stowage, and alleged in said answer that the said baggage was injured by reason of the violence of the sea and unusual weather. For a further and independent defense it alleged therein that it was a part of the contract of transportation that all questions arising under the same should be settled according to Belgium law with reference to which the alleged contract was made, and that the said alleged contract contained a provision which was alleged to be valid under the law of Belgium to the effect that the shipowner should not be liable for loss or injury to the passenger or his baggage arising from perils of the sea, rivers or navigation, or from any act, neglect or default of the shipowner's servants. And for a further, separate and partial defense the claimant alleged in said answer that in and by said contract of transportation it was provided that the shipowner should not, under any circumstances, be liable for any loss or injury to passengers' baggage beyond the sum of two hundred and fifty francs, at which such baggage is valued, unless a bill of lading be given therefor, and freight paid in advance on the excess value of the rate of one per cent. or its equivalent, and the claimant avers that no bill of lading or receipt was given or freight paid on any value in excess of the sum of two hundred and fifty francs by the libelants or by either of them.

VIII. On the 8th day of June, 1898, the above suit came on for trial before the Honorable Addison Brown, District Judge for the Southern District of New York, who, on or about the 1st day of July, 1898, filed his decision to the following effect: That the aforesaid ticket marked "Claimant's Exhibit A" was a contract; that the baggage was damaged by the negligence of the men in charge of the ship; that the clauses of the ticket which purported to exempt the shipowner from liability did not apply, but that the clause limiting the liability to two hundred and fifty francs was applicable; and on the 29th day of October, 1899, a decree in accordance with said decision was made and entered herein awarding to your petitioners herein the sum of only \$96.20, with interest and costs amounting to \$51.59, making in all the sum of \$151.59, instead of the sum of \$4,000 with interest and costs.

Upon said trial your petitioners offered to prove the value of their said baggage, and that the value of the baggage of each of them exceeded in value the sum of \$2,000; but the said District Judge excluded the testimony so offered by your petitioners. Said judge, however, admitted testimony and evidence which showed that the value of the said baggage of each of your petitioners exceeded the sum of two hundred and fifty francs (pp. 15-17, fols. 59-66).

IX. On or about the 29th day of October, 1898, your petitioners were

duly allowed by the said Honorable Addison Brown, District Judge for the Southern District of New York, an appeal from his said decree to the United States Circuit Court of Appeals for the Second Circuit, and it was ordered that a certified transcript of the record and all proceedings in the said case be forthwith transmitted to the said United States Circuit Court of Appeals.

X. A certified transcript of the record and of all proceedings in the case was duly so transmitted to the said United States Circuit Court of Appeals; and on or about the 21st day of April, 1899, the appeal by your petitioners from so much of the aforesaid decree which does not award to each of your petitioners severally damages in the sum of two thousand dollars, and from that part of said decree which limits the recovery of each of your petitioners for damages to the sum of forty-eight and  $\frac{10}{100}$  dollars, came on to be heard, and together with a cross-appeal by the claimants was argued by counsel for all parties before Judges Wallace, Lacombe and Shipman. And thereafter, and on the 25th day of May, 1899, said Circuit Court of Appeals rendered and filed an opinion and decisions written by Judge Lacombe, which, among other things, held that the provisions of Section 2 of the Harter Act as to the limiting of liability by bills of lading or shipping documents does not apply to passenger tickets; that a stipulation in a passenger ticket which limits the liability of the carrier for loss of baggage to two hundred and fifty francs, unless the passenger declares the value of his baggage in excess of such amount, pays for the transportation of the excess and takes a bill of lading therefor, is not so unreasonable as to be void as against public policy; and that such a stipulation, though in terms limiting the liability of the "shipowner or agent" only, inures to the benefit of the ship itself. Said opinion and decision affirmed said decree of said District Court; and a mandate issued accordingly from said Circuit Court of Appeals to said District Court.

XI. On or about the 6th day of July, 1899, an order was made by the District Court of the United States for the Southern District of New York and entered in the office of the Clerk of said Court on the same day, which order directed that the libelants file with the Clerk of said Court on or before the 12th day of July, 1899, the mandate issued herein by the United States Circuit Court of Appeals for the Second Circuit; which mandate ordered, adjudged and decreed that the decree of said District Court be, and it thereby was, affirmed without interest or costs; and said order further directed that all proceedings upon the decree to be entered upon the said mandate be, and they thereby were, stayed until the 14th day of November, 1899.

XII. In accordance with said order, on the 10th day of July, 1899, the said mandate was duly filed in the office of the Clerk of the United States District Court for the Southern District of New York.

XIII. On or about the 20th day of July, 1899, without prejudice to the rights of your petitioners to apply to this Court for a writ of *certiorari*, an order was duly made by the United States District Court for the Southern District of New York and entered in the office of the Clerk of said Court on the same day, which, among other things, ordered, adjudged and decreed: that the decree of the said Circuit Court of Appeals be, and it thereby was, made the decree of the United States District Court for the

Southern District of New York; and that the decree of said District Court entered herein on the 10th day of October, 1898, be, and it thereby was, affirmed.

XIV. The questions and propositions of law involved in this case are substantially as follows:

I. Is the following clause, in a ticket purchased in Paris, France, for the transport of a passenger from Antwerp, Belgium, to the City, County and State of New York, upon an ocean steamship, reasonable, valid and enforceable in a court of the United States assuming the Belgian law does not forbid such a contract?

"The shipowner or agent shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of two hundred and fifty francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo, bill of lading, in use from the port of departure. All questions arising hereunder are to be settled according to the Belgian law."

II. Does the following language, in a ticket purchased in Paris, France, for the transport of a passenger from Antwerp, Belgium, to the City, County and State of New York, upon an ocean steamship release the steamship from liability in a suit in admiralty *in rem* brought by the passenger, assuming that the Belgian law does not forbid such a contract?

"The shipowner, or agent, shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of two hundred and fifty francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo, bill of lading, in use from the port of departure. All questions arising hereunder are to be settled according to the Belgian law."

III. Does the Harter Act—viz, Chapter 105 of the laws passed by the fifty-second Congress at its twentieth session, which is published in volume 27 of the statutes at large at page 445—apply to and regulate the liability in admiralty of an ocean steamship which transports from Antwerp, Belgium, to the City, County and State of New York, trunks, which are the property of a passenger upon said steamship when the contract between the passenger and the steamship, its owner and agent is embraced in a document called a ticket, in print and manuscript form, signed by the agents of the owners of the steamships and also in a receipt for said ticket in the following language:

"Total fr.

"Weight, contents and value unknown and shipped by the Red Star Line steamer, subject to the conditions contained in the Co.'s ticket and bill of lading.

RED STAR LINE

"Antwerp, Dec. 97.

CAISSE."

All of said questions were duly raised and argued by your petitioners in said District Court and in said Circuit Court of Appeals.

XV. Concerning the clause in said ticket limiting the liability of the carrier, Judge Lacombe said in his opinion, which is reported in Volume 94 of the Federal Reporter at page 888:

"However unreasonable would be a 'condition' attempting to relieve the carrier entirely from liability in excess of some named amount, there seems to be no impropriety in the carrier's requiring the passenger to declare the value of the baggage in excess of such named amount, to take regular bill of lading therefor, and to pay for its transportation in proportion to its value, with the proviso that, if he fails so to do, the carrier will not be liable. As to the question whether the sum named (two hundred and fifty francs) is too small, the supreme court, in *The Majestic*, *supra*, intimated some doubt as to the reasonableness of ten pounds in the case of a first-cabin passenger's baggage, but rendered no decision thereon. In view of the circumstance that the condition complained of contained an offer to carry the excess value under a regular bill of lading, we are not prepared, in the absence of authority, to hold that two hundred and fifty francs is an unreasonable valuation for personal baggage of a second-cabin passenger not thus carried."

XVI. In *The Majestic*, 166 U. S. 875, 886, this Court, speaking through the Chief Justice of the United States, said concerning the following clause:

"Neither the shipowner nor the passage broker or agent is in any case liable for loss or injury to or delay in delivery of luggage or personal effects of the passenger beyond the amount of ten pounds unless the value of the same be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property," with certain exceptions, "is paid;" that it was a "limitation which we must say *does not* strike us as *reasonable*, in view of the 'twenty cubical feet' of baggage for each which the company had expressly contracted to carry."

In the case of *Glovinsky v. Cunard Steamship Co.* (4 N. Y. Miscellaneous Reports, 266), the General Term of the City Court of New York held that the same limitation, to the amount of fifty dollars (\$50), upon the liability of a transatlantic steamship company for damage to the baggage of a steerage passenger, when it was contained in a passenger ticket, was unreasonable and void. The sum of one hundred dollars (\$100) is the usual limitation for such damage in railroad tickets for short journeys in the United States.

XVII. And your petitioners further aver that the present case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons, among others:

1. Because, in the case of *The Majestic*, *supra*, this Court intimated that a provision in a passenger ticket exempting the carrier from all liability for loss of baggage beyond ten pounds is unreasonable.

2. Because the Circuit Court of Appeals held that there is no authority as to what is a reasonable limitation of liability for baggage in a passenger ticket.

3. Because the questions of law involved herein have not been passed upon by this Court.

4. Because the public interests and the interests of jurisprudence require the decision of this Court upon the questions of law involved herein.



5. Because, in view of the large number of persons using similar steamship tickets, said questions are of sufficient general, national and material importance and interest as to make it necessary that they should be determined by the Court of last resort.

6. Because there is a conflict in this respect between the law as expounded by said Circuit Court of Appeals and the rule observed in the State Courts held in the same district and circuit.

Wherefore your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

LIZZIE STEARNS BLEECKER.

ELSIE L. BLEECKER.

ROGER FOSTER,

Petitioners' Attorney.

STATE OF NEW YORK, } ss.  
Southern District of New York.

LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER, being duly sworn, say, and each for herself says: I have read the foregoing petition. The same is true to my own knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the court in which this action has been heard.

LIZZIE STEARNS BLEECKER.

ELSIE L. BLEECKER.

Sworn to before me this 20th day of September, 1899.

[SEAL]

GEORGE E. HAMMOND,

Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

ROGER FOSTER,

Of Counsel for Petitioners.

*Supreme Court of the United States of America.*

In the Matter of the Petition of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER for a Writ of *Certiorari* directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of LIZZIE STEARNS BLEECKER and ELSIE L. BLEECKER, Libelants, Appellants, against

THE STEAMSHIP "KENSINGTON," her BOILERS, ENGINES, etc., THE INTERNATIONAL NAVIGATION COMPANY, Claimants and Appellants.

SIRS — Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of Lizzie Stearns Bleeker

and Elsie L. Bleecker, sworn to the 20th day of September, 1899, I shall move the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 16th day of October, 1899, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated New York, September 21, 1899.

Yours, etc.,                      ROGER FOSTER,  
Proctor, Attorney and Counsel for Libelants, Appellants,  
85 Wall Street, New York.

TO MESSRS. BIDDLE & WARD, Proctors and Counsel for Claimants, and  
TO THE INTERNATIONAL NAVIGATION COMPANY.

*Supreme Court of the United States of America.*

In the Matter of the Petition of LIZZIE  
STEARNS BLEECKER and ELSIE L.  
BLEECKER for a Writ of *Certiorari*  
directed to the Circuit Court of  
Appeals for the Second Circuit, to  
bring before the Supreme Court  
the case of LIZZIE STEARNS  
BLEECKER and ELSIE L. BLEECKER,  
Libelants, Appellants,  
*against*  
THE STEAMSHIP "KENSINGTON," her  
BOILERS, ENGINES, etc., THE INTER-  
NATIONAL NAVIGATION COMPANY,  
Claimants and Appellants.

And now come the libelants, appellants aboved named, by Roger Foster, their counsel, attorney and proctor, and move this Court, upon a certified copy of the transcript of the record herein, and upon the annexed petition sworn to the 20th day of September, 1899, for a writ of *certiorari*, directed to the Circuit Court of Appeals for the Second Circuit and to the District Court of the United States for the Southern District of New York, to bring before this Honorable Court the case of Lizzie Stearns Bleecker and Elsie L. Bleecker, libelants and appellants, against the steamship "Kensington," her boilers, engines, etc., The International Navigation Company, claimants and appellants, recently decided by the Circuit Court of Appeals of the United States for the Second Circuit, and by the District Court of the United States for the Southern District of New York, for such proceedings therein as to this Court may seem just; and for such other and further relief in the premises as may be just.

**FORM XXXIV.—MOTION TO DISMISS OR TO AFFIRM.***In the Supreme Court of the United States. October Term, 1891. No. 888.*

BENJAMIN H. TATEM, JOHN C. CURTIN, and WILLIAM  
 G. BAILEY, Executors of Walter F. Chadwick, De-  
 ceased, and NORMA D. CHADWICK, Appellants,  
*against*  
 ALTHA CHADWICK.

Comes now the appellee, by her counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Montana.

And the said appellee, by counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which said appeal purports to have been taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

HENRY E. DAVIS,  
 Counsel for Appellee for the Purposes of These Motions.

**FORM XXXV.—NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND TO AFFIRM.***In the Supreme Court of the United States. October Term, 1891. No. 888.*

TO MESSRS. MARTIN F. MORRIS AND J. C. ROBINSON,  
 Counsel for Appellants:

Please take notice that on Monday, the fourteenth day of December, A. D. 1891, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

HENRY E. DAVIS,  
 Counsel for the Appellee for the Purposes of the Motions.

**FORM XXXVI.—RULE FOR MANDAMUS.**

[6 Peters, 774.]

Ex parte MARTHA BRADSTREET, IN THE  
 MATTER OF MARTHA BRADSTREET,  
 Demandant,  
*against*  
 APOLLOS COOPER et al., Tenants.

Mr. Jones, of counsel for the demandant in the above named cases, moved the court for a rule to be granted, to be served on the district judge of the

District Court of the United States for the Northern District of New York, commanding him to be and appear before this court, either in person or by an attorney of this court, on the first day of the next January Term of this court, to wit, on the second Monday of January. Anno Domini 1888, to show cause, if any he have, why a mandamus should not be awarded to the said district judge of the Northern District of New York, commanding him,

1. To reinstate, and proceed to try and adjudge according to the law and right of the case, the several writs of right and mises thereon joined, lately pending in said court, and said to have been dismissed by order of said court, between Martha Bradstreet, demandant, and Apollos Cooper et al., tenants.

2. Requiring said court to admit such amendments in the form of pleading, or such evidence as may be necessary to aver or to ascertain the jurisdiction of said court in the several suits aforesaid.

3. Or if sufficient cause shall be shown by the said judge on the return of this rule, or should otherwise appear to this court, against a writ of mandamus requiring the matters and things aforesaid to be done by the said judge, then to show cause why a writ of mandamus should not issue from this court, requiring the said judge to direct and cause full records of the judgments or orders of dismissal in the several suits aforesaid, and of the processes of the same, to be duly made up and filed, so as to enable this court to re-examine and decide the grounds and merits of such judgments or orders upon writs of error, such records showing upon the face of each what judgments or final orders dismissing, or otherwise definitely disposing of said suits, were rendered by the said District Court, at whose instance, upon what grounds, and what exceptions or objections were reserved or taken by said demandant, or on her behalf, to the judgments or decisions of the said District Court in the premises, or to the motions whereon such judgments or decisions were found; and what motion or motions, application or applications, were made to said court by the demandant, or on her behalf; and either granted or overruled by said District Court, both before and after said judgments or decisions dismissing or otherwise finally disposing of said suits; especially what motions or applications were made by said demandant or on her behalf to the said District Court, to be admitted to amend her counts in the said suits, or to produce evidence to establish the value of the lands, etc., demanded in such counts, together with all the papers filed, and proceedings had in said suits respectively.

On consideration whereof, it is now here considered and ordered by this court that the rule prayed for be, and the same is hereby granted, returnable to the first day of the next January Term of this court, to wit, on the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three. *Per* Mr. Chief Justice MARSHALL.

## FORM XXXVII.—WRIT OF MANDAMUS.

[7 Peters, 634, 648.]

Ex parte BRADSTREET, IN THE MATTER OF }  
 MARTHA BRADSTREET, Demandant. }

Mr. Chief Justice MARSHALL.

UNITED STATES OF AMERICA, ss.

*To the Honorable Alfred Concklin, Judge of the District Court of the  
 United States for the Northern District of New York, GREETING:*

Whereas, one Martha Bradstreet hath heretofore commenced and prosecuted in your court several certain real actions, or writs of right, in your court lately pending between the said Martha Bradstreet, demandant, and the following named tenants severally and respectively, to wit, Apollos Cooper and others (naming them). And whereas, heretofore, to wit, at a session of the Supreme Court of the United States, held at Washington on the second Monday of January, in the year 1832, it appeared, upon the complaint of the said Martha Bradstreet, among other things, that at a session of your said court, lately before holden by you, according to law, all and singular the said writs of right then and there pending before your said court, upon the several motions of the tenants aforesaid, were dismissed for the reason that there was no averment of the pecuniary value of the lands demanded by the said demandant in the several counts filed and exhibited by the said demandant against the several tenants aforesaid; which orders of your said court, so dismissing the said actions, were against the will and consent of said demandant; whereupon the said Supreme Court, at the instance of said demandant, granted a rule requiring you to show cause, if any you had, among other things, why a writ of mandamus from the said Supreme Court should not be awarded and issued to you, commanding you to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right aforesaid, and the mises therein joined. And whereas, at the late session of the said Supreme Court held at Washington on the second Monday of January in the year 1833, you certified and returned to the said Supreme Court, together with the said rule, that after the mises had been joined in the several causes mentioned in the said rule, motions were made therein, on the part of the tenants, that the same should be dismissed upon the ground that the counts respectively contained no allegation of the value of the matter in dispute, and that it did not therefore appear, by the pleadings, that the causes were within the jurisdiction of the court: that, in conformity with what appeared to have been the uniform language of the national courts upon the question, and your own views of the law, and in accordance especially with several decisions in the Circuit Court for the third circuit (see 4 Wash. C. C. Rep. 482, 624), you granted their motions; and assuming that the causes were rightly dismissed, it follows of course that you ought not to be required to reinstate them unless leave ought also to be granted to the demandant to amend her counts: and whereas, afterwards, to wit, at the same session of the said Supreme Court last aforesaid, upon consideration of your said return and of the cause shown by you therein against the said rule's being made absolute, and against the awarding and issuing of the said writ of mandamus, and upon consideration of the arguments of

counsel, as well on your behalf, showing cause as aforesaid, as on behalf of the said demandant, in support of the said rule, it was considered by the said Supreme Court, that you had certified and returned to the said court an insufficient cause for having dismissed the said actions, and against the awarding and issuing of the said writ of mandamus, pursuant to the rule aforesaid; the said Supreme Court being of the opinion, and having determined and adjudged upon the matter aforesaid, that in cases where the demand is not made for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of the said Supreme Court and of the courts of the United States, is to allow the value to be given in evidence; that in pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the value of the property demanded in evidence, either at or before the trial of the cause, and would have a right to give it in evidence in the said Supreme Court; consequently that she cannot be legally prevented from bringing her cases before the said Supreme Court; and it was also then and there considered by the said Supreme Court that the peremptory writ of the United States issue, requiring and commanding you, the said judge of the District Court, to reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and Apollos Cooper and others, the tenants aforesaid; therefore you are hereby commanded and enjoined that immediately after the receipt of this writ, and without delay, you reinstate and proceed to try and adjudge, according to the law and right of the case, the several writs of right and the mises therein joined, lately pending in your said court between the said Martha Bradstreet, demandant, and the said Apollos Cooper and others, the tenants herein above named, so that the complaint be not again made to the said Supreme Court; and that you certify perfect obedience and due execution of this writ to the said Supreme Court, to be held on the first Monday in August next. Hereof fail not at your peril, and have then there this writ.

Witness the Honorable John Marshall, Chief Justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-three.

[SEAL.]

W. T. CAROL,

Clerk of the Supreme Court of the United States.

## ADMIRALTY FORMS.

Prepared by CHARLES C. BURLINGHAM, Esq., of the New York Bar.

### FORM I.—LIBEL IN REM.

*To the Honorable Charles L. Benedict, Judge of the District Court of the United States for the Eastern District of New York:*

The libel of A., B., C., and D. against the steamships X. and Y., their engines, etc., and against all persons claiming any interest therein, in a cause



of action, civil and maritime, of a nature hereinafter more specifically set forth, alleges as follows: —

*First.* At all the times hereinafter mentioned the libelants were underwriters, members of Lloyd's, and lawfully engaged in and transacting the business of marine insurance in London, England.

*Second.* On or about the 11th day of June, 18—, the firm of R. & Company, merchants, of the city of New York, shipped, in good order and condition, on board the steamer X., then lying in the port of New York, and bound to the port of H., to be transported in said steamer to said port of H., three hundred and ten tubs of butter, one hundred and forty-five of which were marked "A," one hundred of which were marked "B," and sixty-five of which were marked "C," and which tubs of butter the agents of said steamer X. did agree to transport to and deliver at H. by the said steamer X. to the order of the shipper, and at the time aforesaid did issue a bill of lading in accordance with such agreement. Said goods were shipped by R. & Company for joint account with F. G. & Company, of H., and were owned by the said R. & Company and the said F. G. & Company jointly, and after said shipment the bill of lading issued as aforesaid therefor was duly indorsed by said R. & Company and delivered to said F. G. & Company.

*Third.* On or about the 11th day of June, 18—, the firm of M. & S., merchants, of the city of New York, shipped in good order and condition on board said steamer X., to be transported in said steamer from the port of New York to the port of H., one hundred and two boxes of cheese, thirty-nine of which were marked [F]<sub>17</sub>, twenty-six of which were marked [F]<sub>18</sub>, and thirty-seven of which were marked [F]<sub>19</sub>, and which boxes of cheese the agents of said steamer did agree to transport to and deliver at H. to the order of the shippers, and at the time aforesaid did issue a bill of lading in accordance with such agreement. Said goods were shipped by said M. & S. for account of the firm of F. G. & Company, of H., who were and continued to be the owners of the said goods, and after said shipment said bill of lading issued as aforesaid therefor was duly indorsed by said M. & S. and delivered to said F. G. & Company.

*Fourth.* On or about the 12th day of June, 18—, the said steamer X. set sail from the port of New York, bound for the port of H., having on board both the aforesaid lots of merchandise, which had been shipped on board said steamer at said port of New York in good order and condition, and at about half-past one o'clock in the afternoon of June 13, 18—, the said steamer X., when about three hundred and ten miles east of Sandy Hook, came into violent collision with said steamer Y., and by said collision a large hole was made in the starboard side of the steamer X., by reason whereof the compartments in which the above mentioned lots of merchandise were stowed were flooded, and the said lots of merchandise were wholly lost to the owners, most of them being lost through the said hole into the sea and the others being jettisoned.

*Fifth.* On or about the 29th day of December, 18—, the libelants, in the regular course of their business as marine insurers, issued to D. & W., for and in consideration of the premiums paid, an open policy of insurance in the sum of £5000, British sterling, bearing date on said 29th of Decem-

ber, 18—, and in and by said policy of insurance the libelants agreed to insure the said D. & W., as well in their own name as for and in the name and names of every other person or persons to whom the same did, might, or should appertain in part or in whole, and did cause them and each of such persons to be insured at and from New York and [or] Philadelphia and [or] Portland and [or] Boston to London and [or] port or ports, place or places, on the west coast of Great Britain, upon any kind of goods and merchandise against loss or damage arising from adventures and perils of the sea and all other perils, loss, and misfortunes that might come to the hurt, detriment, or damage of said goods upon the voyage; that by the terms of said policy of insurance the libelants A. and B. each became insurer in the sum of £—, British sterling, of said £5000, British sterling, which was the total sum covered by said policy, and the other libelants each became insurer to the extent of £—, British sterling, and the libelants agreed to become insurers in such proportions upon any shipment declared under the said policy of insurance; that thereafter and in the month of June, 18—, D. & W. declared insurance upon said lot of three hundred and ten tubs of butter to the amount of £555, British sterling, for the benefit of the owners of the said tubs of butter, and they further declared insurance upon said lot of one hundred and two boxes of cheese in the sum of £150, British sterling, for the benefit of the owners of the said boxes of cheese, and the said insurance was accepted and indorsed by and for the libelants upon said policy, said sums insured being only equal to or less than the true value of said goods.

*Sixth.* The aforesaid collision occurred as follows: The X., up to within a very short time before the collision, was proceeding on an easterly course at the rate of about fourteen miles an hour, which speed she maintained until the collision; and the said steamer Y., up to within a very short time before the collision, was proceeding on a west by north course, bound from Liverpool to New York, at a high rate of speed; the sea was smooth, and there was little wind, but there was a dense fog, in which the said steamers had been running for a long time before the collision; neither vessel had sufficient lookouts; both vessels were giving at intervals signals with their steam-whistles. While so proceeding, the officers of the steamer Y. heard the fog signal of the X. over the port bow of their vessel, and gave orders to the man at the wheel to port, which order was executed; and the officers of the X. heard the fog signal of the steamer Y. over the starboard bow of their vessel, and gave orders to the man at the wheel to starboard, which order was executed. A few minutes later, each steamer became visible to those on board of the other steamer, close at hand; whereupon those in charge of the steamer Y. ordered her engines to be stopped and reversed, but before any perceptible influence was exerted on the speed of the steamer the two vessels came into collision.

*Seventh.* The collision was due to the fault and negligence of those in charge of the steamers X. and Y. respectively, in that they were proceeding at too high a rate of speed, in that they had no good and sufficient lookouts, in that they did not give the proper signals by which to indicate each to the other their respective courses and movements, in that they did

not heed and note the signals given by the approaching vessel, and in that they did not stop and reverse their engines before the collision and at such time as to overcome their headway, and to the fault of those in charge of the navigation of the steamer Y. in that they ported their helm and did not hold their course, and to the fault of those in charge of the navigation of said steamer X. in that they starboarded their helm instead of porting; and the said collision was not in any respect due to the fault of the libelants.

*Eighth.* By reason of the premises and the collision aforesaid, and the resultant loss and destruction of said lots of merchandise, the libelants as insurers as aforesaid became liable to pay, and have paid, on or about the 15th day of August, 18—, to the said F. G. & Company, for the loss as aforesaid for said three hundred and ten tubs of butter, the sum of £555, British sterling, and for the loss and destruction of said one hundred and two boxes of cheese as aforesaid, the further sum of £150, British sterling, and have become subrogated to all the rights of the owners of said merchandise, and that they have received the sum of £69 1 2, British sterling, being allowance in general average for goods jettisoned.

*Ninth.* By reason of the premises and the payment aforesaid, the libelants have sustained damages in the sum of £635 18 10, British sterling, equivalent in money of the United States to three thousand and eighty-four  $\frac{11}{100}$  dollars (\$3084 $\frac{11}{100}$ ), with interest thereon from the 15th day of August, 18—, no part of which has been paid, although payment thereof has been duly demanded by the libelants.

*Tenth.* Said steamers X. and Y. are now within this district, and within the jurisdiction of this court.

*Eleventh.* All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libelants pray that process, in due form of law and according to the course and practice of this court in cases of admiralty and maritime jurisdiction, may issue against the said steamships X. and Y., their engines, etc., and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said steamships X. and Y., their engines, etc., may be condemned and sold to satisfy the claims of the libelants aforesaid, with interest thereon from the 15th day of August, 18—, and costs.

A., B., C., & D.,

By H. B. B., Attorney.

UNITED STATES OF AMERICA, } ss.  
District of Maryland.

H. B. B., being duly sworn, says that he is the attorney in fact of the libelants above named, none of whom are now in the United States; that deponent has read the foregoing libel, and the same is true to the best of his knowledge.

H. B. B.

Sworn to before me, this — day of —, 18—.

[SEAL]

— —, Notary Public.

D. & F., Proctors for Libelants.

## FORM II.—INTERROGATORIES ANNEXED TO LIBEL.

*District Court of the United States for the Eastern District of New York.*

THE W. MARINE INSURANCE CO., Libelant,  
against

THE C. STEAMSHIP CO., L'D, AND ANOTHER, Respondents. }

*Interrogatories* propounded by the libelant to the respondent, The C. Steamship Company, L'd, which it is required to answer by its officers or its duly authorized agents or servants in writing and under oath.

*First Interrogatory.*—By whom were the 760 sacks of flour mentioned in the fourth article of the libel herein delivered to the steamship X., and by whom were they delivered to the respondent, The C. Steamship Company, L'd? State fully the circumstances attending such delivery as well to the X. as to the said respondent, giving time and place of such delivery.

*Second Interrogatory.*—Did the said steamer X. or the said respondent give any receipt for the said 760 sacks of flour or for any of them to the person or persons or corporation delivering the said goods?

*Third Interrogatory.*—Have you or have you ever had what purported to be a copy of the bill of lading issued for any of the goods referred to in the fourth, fifth, sixth, and seventh articles of the libel herein? For which of the said goods have you had such copy of bill of lading? From whom did you receive each such copy, and when and where? Answer fully, stating particularly which lots of cargo were covered by each of such copies of bills of lading. Were such copies of bills of lading such as are ordinarily known as "ship's copies" or "carrier's copies"?

New York, November 9, 18—.

— — —,  
Proctors for Libelant.

## FORM III.—LIBEL IN PERSONAM WITH CLAUSE OF FOREIGN ATTACHMENT.

*To the Honorable John T. Nixon, Judge of the District Court of the United States for the District of New Jersey:*

The libel and complaint of — — —, residing at Brooklyn, N. Y., — — — and — — —, residing at — — —, and — — —, residing at — — —, for themselves as sole owners of the late bark K., and of her tackle, apparel, and furniture, and in behalf of the shippers and owners of the cargo laden thereon, as carriers thereof, and — — — aforesaid, as master of said bark, for himself and in behalf of the officers and the survivors of the crew thereof, as owners of their personal effects, against the — — — Company, a foreign corporation, in a cause of collision, civil and maritime, alleges as follows:

*First.* That at the time of the collision hereinafter set forth the libelants were the sole owners of the British bark K., which was a vessel of 1186 tons register, and was up to the time of said collision stout, tight, staunch, well equipped and appointed.

*Second.* That at the time of the collision hereinafter set forth the respondent was, and for a long time previous thereto had been, a corporation

created by and existing under the laws of a foreign government, to wit: the Empire of Germany, or of some kingdom or free city that has now become a part of said empire, and owned or chartered divers steamships with which they navigated the ocean. That among other steamships, owned by said company, was the steamship V., which said company employed in carrying cargo and passengers between the ports of — and New York, and at the time of the collision said steamship was in the possession of the agents or servants or mariners employed by said company, and was being navigated by them.

*Third.* That on or about the — day of — 18—, the libelants' said bark, with a full and valuable cargo of cement, pipe-clay, and empty petroleum barrels, and other merchandise, left the port of — bound on a voyage to New York, under command of a competent master with a good and sufficient crew, and being well furnished and provided with all requirements for navigation, as required by law.

All went well until the — day of —, 18—. At about two o'clock in the afternoon of that day, the bark came into collision with said steamship V., when in about latitude 41° 08' north, and longitude 65° 08' west, as ascertained by dead reckoning.

The weather was thick, with snow squalls and dense vapor; the wind was blowing strong from west northwest, and the bark was sailing on her starboard tack close hauled, heading about southwest by south, and making an average rate of speed of about four knots an hour. All sails were furled, except the foresail, fore lower topsail, main lower topsail, reefed upper main topsail, inner jib, fore topmast staysail, main topmast staysail, main trysail, mizzen staysail, and reefed spanker.

The mate was in charge of the deck, and a competent lookout was stationed on the top gallant forecastle of the bark, by whom single blasts were made with a fog horn at short intervals of about a minute, and by whom a careful lookout was kept. A competent able seaman was at the wheel. The rest of the watch were all at their posts, listening carefully for signals, and looking out for other vessels.

Two or three minutes before the collision, the mate, while standing on the forecastle head—the vapor suddenly lifting or clearing—saw indistinctly the bow of a steamship, which proved to be the V., and which appeared to be about half a mile distant, and off the bark's starboard bow, and about four points forward the starboard beam, heading for the bark. The bark kept steadily on her course by the wind, and the lookout made one loud blast of the fog horn towards said steamship. Almost immediately, one short blast of the whistle of the steamship was heard, and she was seen to be under a port helm, carrying full sail, and approaching at great speed, and heading to cross the bow of the bark. When the bark was two ship's lengths off from the steamship, and a collision was inevitable, the helm of the bark was put hard a port to deaden her way and lessen the damage, if possible, but the steamship's port-quarter came into collision with the bark's bows nearly at right angles. The force of the collision carried away the bark's jibboom, bowsprit, foremast and all gear attached, and smashed the bows completely in, cutting away the deck frame aft to within one beam of the forward hatch, and cutting away all the stem

above the twenty-feet line — the bark drawing at the time about fourteen feet of water — and carrying overboard and drowning two men who had remained at their posts of duty on the forecastle head.

As said steamship passed on to the leeward of the bark horns were blown, the bell rung, and shouts given to the steamship to stop. The steamship passed out of sight, the vapor and snow shutting in thicker. Afterwards it cleared again and the steamship was seen lying to leeward, and soon after was seen signaling, asking if the bark was leaking. The bark, not then knowing the extent of the leak, replied, "Do not abandon me," and signaled for a boat from the steamship. A boat and crew thereupon came up and inquired of the master whether he would abandon the bark.

At that time the full extent of the injuries to the vessel was unknown. The master, therefore, declined to abandon his vessel, and requested that the steamship should lie by him until morning, which the officer in charge of the steamship's boat promised and agreed to do, and thereupon returned to the steamship.

The bark was found to be leaking, and shortly after the departure of the steamship's boat the wind increased. The maintopmast head with the mizzen topgallant mast was carried away, taking with them the main topgallant mast with the yards attached, which fell on the deck, partially disabling the captain and the sailmaker and breaking the starboard boat and doing other injuries. Nevertheless, every effort was made by the officers and crew to save their vessel by throwing overboard cargo to lighten her forward, by cutting away wreckage, and by closing over the bow with a sail. The waves washed violently over the bow, threatening the lives of the crew, tearing in pieces the sail, and rendering vain all efforts to close the breach made by the collision.

During the night the storm increased to a heavy gale, and the pumps had to be kept going constantly, the vessel laboring fearfully in the fierce sea, the officers and men expecting her to founder at any moment. When daylight came the weather was clear but overcast. On going aloft no steamer was to be seen. The men of the bark then discovered that they had been deserted by the steamship in spite of their repeated requests and the promise of the officer to lie by them during the night.

Thereafter, on Saturday and Sunday, the officers and crew had to make extraordinary exertions to keep their wrecked vessel afloat. As many men as could be spared from the pumps, which were kept continually going, were employed in attempting to board up the broken bows, which were pitching into the heavy seas and rendering their efforts unavailing. On Monday morning the vessel was on a severe cross-sea, the officers and men were almost overcome by their exhausting labors, when the steamship R. hove in sight. The bark set a signal of distress. The R. bore down, and succeeded in sending a lifeboat to the rescue of the survivors upon the wreck. The sea was running so dangerously that the boat dared not come alongside but remained over a hundred feet astern. The master and the survivors of the crew were lowered over the bark's stern and hauled through the sea to the lifeboat,—the master being the last to leave the vessel,—and were taken on board the R., having lost all their personal effects, and were humanely cared for until, on April 2nd, 188—, they were safely landed at Antwerp.



*Fourth.* That said collision and loss took place without any fault or want of maritime conduct on the part of the mariners or persons in charge of the libelants' bark, but solely through the negligence and misconduct and unseamanlike action of the officers or persons in charge of the steamship V., in the following particulars among others: —

1. Said steamship was proceeding at full speed of not less than fourteen knots per hour, although for more than three hours before the collision the weather had been thick with falling snow and dense vapor.

2. Said steamship was carrying all sail set before the wind, thus using every means to accelerate her speed, instead of going at moderate speed, as she was by law required to do.

3. Said steamship was not blowing proper fog whistles as she was by law required to do, and if any such whistles were blown they were sounded irregularly, or were not loud enough to be heard by vessels lying to the leeward.

4. Said steamship had no proper lookouts stationed where they are required to be; and, in particular, the libelants charge that it was the duty of the officers of said steamship to station a competent man at the foremast head, where the vapor would have been less dense and objects were discoverable before they became visible from the steamship's deck.

5. Said steamship, proceeding before the wind, was burning a large quantity of soft coal which generated a great amount of smoke that blew forward of her funnels and, being caught in her foresail and driven downward by the dampness of the atmosphere, blew ahead of her bows and obscured the view from her deck and from the forward bridge, rendering an additional masthead lookout and a reduction of speed specially necessary.

6. The officers of said steamship were guilty of fault and violation of law, in not immediately stopping or slowing their engines upon sighting said bark.

7. The officers of said steamship, having failed to see said bark by their gross inattention and neglect of the above precautions, were further at fault and were guilty of criminal negligence in attempting to cross the bark's bows instead of keeping out of her way by starboarding their helm and going under the stern of said bark, as they might readily have done, and so avoided her altogether.

8. The master of said steamship deserted said bark at nightfall, upon the wind increasing, and was thereby guilty of base and unseamanlike behavior in abandoning the survivors of the collision, and refusing to stand by the wreck until morning as had been promised in his behalf.

9. The master and the officers of said steamship were also at fault in not making a truthful report of said collision upon the arrival of said steamship at the port of New York, and, in particular, in not reporting the lives lost overboard from said bark, which casualty had been plainly visible from said steamship.

10. The officers of the V. are also chargeable with other faults and negligences, which the libelants pray they may be permitted to specify more particularly at the trial hereof.

*Fifth.* That by reason of said collision the libelants have sustained severe damages, as follows, that is to say: They allege the bark K., together

with her equipment, ship stores, and pending freight to have been of the value of forty-six thousand five hundred dollars; and that as carriers of the cargo therein, and in behalf of the owners thereof, the libelants have sustained and are entitled to damages to the value thereof, which amounts to twenty thousand dollars; that the personal effects of the master lost by said collision were of the value of five hundred dollars, and of the mates and mariners about thirteen hundred dollars, making the total sum claimed by the libelants from the respondent to be sixty-eight thousand three hundred dollars, together with interest thereon, by reason of the wrongful acts of the said company through its agents, servants, and mariners in bringing about the aforesaid collision.

*Sixth.* That the respondent is, as heretofore alleged, a foreign corporation, as the libelants are informed and believe, and that said company has property within the jurisdiction of this Honorable Court, to-wit, a certain steamship called the L.

*Seventh.* That all and singular, the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libelants pray that process in due form of law according to the course of this Honorable Court may issue against said respondent, the president or officers thereof, and that they may be required to answer on oath this libel and the matters herein contained, and that, if said company cannot be found, then the goods, chattels, and effects thereof within the jurisdiction of this Court may be attached to an amount sufficient to answer the libelants' claim, and that this Honorable Court will be pleased to decree to the libelants the payment of the amount which shall be due unto them for the cause aforesaid, and that the respondent may be condemned to pay the same with interest thereon and the costs of this suit, and that the libelants may have such other and further relief as in law and justice they may be entitled to receive.

Sworn to for themselves, and on behalf of their co-libelants, this — day of April, 188—.

— —, Notary Public, City and County of New York.

— —, Proctors for Libelants.

— —, Advocate.

#### FORM IV.—STIPULATION FOR LIBELANT'S COSTS.

*District Court of the United States for the Eastern District of New York.*

Stipulation for libelant's costs entered into pursuant to the rules and practice of this court.

WHEREAS a libel was filed in this Court, on the — day of —, 1891, by the R. R. Company against the steam-tug E., her engines, etc., and the schooner F., her tackle, etc., for the reasons and causes in said libel mentioned, and praying that said vessels be condemned and sold to pay the claim of the libelant, and the said libelant, and John Doe and Richard Roe, sureties, parties hereto, hereby consenting, and agreeing that in case of default or contumacy on the part of the libelant, or its sureties, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

*Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred and fifty dollars, conditioned that the libelant above named shall appear and answer to the cause and to interrogatories, and shall pay all such costs as shall be awarded against it by this court, or, in case of appeal, by the Appellate Court.*

R. R. Co.  
JOHN DOE  
RICHARD ROE

Taken and acknowledged this — day of —, 189—, before me,  
[SEAL.] — —, Notary Public.

SOUTHERN DISTRICT OF NEW YORK, ss.

John Doe and Richard Roe, parties to the above stipulation, being duly sworn, do depose and say that they reside in the Southern and Eastern Districts of New York, and each that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

Sworn to, etc.

#### FORM V.—CLAIM OF OWNER.

At a stated term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms in the City of New York, on the 5th day of November, 1891.  
Present: The Honorable Addison Brown, District Judge.

THE SCHOONER R., HER TACKLE, ETC.,  
ada.  
RICHARD ROE }

And now X. Y., part owner of the schooner R., intervening for the interest of himself and A. B., C. D., and E. F., his co-owners, in the said schooner, appears before the Honorable Court, and makes claim to the said schooner, etc., as the same are attached by the marshal under process of this Court at the instance of Richard Roe, and the said X. Y. avers that he was in possession of the said schooner at the time of the attachment thereof, and that the persons above named are true and *bona fide* owners of the said schooner, and that no other person is the owner thereof, wherefore they pray to defend accordingly.

X. Y.

Sworn to and subscribed, this 5th day of November, A. D. 1891, before me.  
[SEAL.] D. E., Notary Public.

S. & G., Proctors for Claimants.

#### FORM VI.—CLAIM OF AGENT.

At a Stated Term, etc. Present: The Honorable — —, District Judge.

THE STEAMSHIP O., HER ENGINES, ETC.,  
HER CARGO AND FREIGHT,  
ada.  
JOHN SMITH }

And now B. and Company, intervening as agents for the interest of the Steamship Company, Limited, in the said steamship O., her cargo, and

freight, appear before the Honorable Court and make claim to the said steamship, her cargo, and freight, as the same are attached by the marshal, under process of this Court at the instance of John Smith, and the said B. and Company aver that they were in possession of the said steamship, her cargo, and freight at the time of the attachment thereof, and that the corporation above named is the true and *bona fide* owner of the said steamship, and the carrier of said cargo, and that no other person is the owner or carrier thereof; and said B. and Company are the true and lawful bailees thereof, as agents, wherefore they pray to defend accordingly.

B. & Co., Agents for the S. S. Co., L'd.

S. & G., Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK, } ss.  
City and County of New York. }

A. B., being duly sworn, deposes and says that he resides in the City of New York; that he is a member of the firm of B. and Company above named; that the owner of said steamship is a foreign corporation, having its principal office in Liverpool, and that this deponent is duly authorized to put in this claim in behalf of the owner of the said steamship; and that the said claim is true to the knowledge of this deponent, except as to the matters therein stated on information and belief, and that as to such matters he believes it to be true.

Sworn to, etc.

## FORM VII.—STIPULATION FOR CLAIMANT'S COSTS.

*District Court of the United States for the District of New Jersey.*

Stipulation entered into pursuant to the rules and practice of this court.

Whereas a libel was filed in this Court on the 10th day of April, in the year of our Lord one thousand eight hundred and ninety, by A. B. and others, against 500 tons of chalk lately laden on board the steamship G., for the reasons and causes in said libel mentioned, and praying that process may issue against said chalk, and the parties hereto hereby consenting that in case of default or contumacy on the part of the claimant or its surety execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands;

And whereas also a claim has been filed in said cause by The N. J. Lime Co.:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and expenses which shall be awarded against it by the final decree of this Court, or upon an appeal, by the Appellate Court.

THE N. J. LIME Co., by X. Y., President.  
JOHN DOE.

Taken and acknowledged, this 10th day of April, 1891, before me,

— —, Notary Public.

[Affidavit as in Form IV.]

## FORM VIII.—STIPULATION FOR VALUE.

*District Court of the United States for the Eastern District of New York.*

Stipulation for value entered into pursuant to the rules and practice of this court.

Whereas a libel was filed on the — day of —, 1890, by A., B., C., and D., against the steamship X., her engines, etc., impleaded, for the reasons and causes in the said libel mentioned; and whereas the said steamship is in the custody of the Marshal under the process issued in pursuance of the prayer of said libel [or, whereas the libelants have agreed not to issue process against said steamship in consideration of the owners thereof appearing and filing a claim thereto and stipulations for costs and value]: And whereas a claim to said vessel has been filed by the Steamship Company, L'd, and the value thereof has been fixed by consent for the purposes of bonding [or, by appraisement] at the sum of six thousand dollars, as appears from said consent [or appraisement] now on file in said Court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its sureties, execution for the above agreed value, with interest thereon from this date, may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said District Court or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree, to S. & G., Esquires, Proctors for the Claimant of said steamship X., abide by and pay the money awarded by the final decree rendered by this Court, or the Appellate Court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

S. S. Co. L'd,  
by B. & Co., Agents  
JOHN DOE.  
RICHARD ROE.

Taken and acknowledged, this — day of —, 1890, before me,  
[SEAL.] — —, U. S. Commissioner.

[Same affidavit as in Form IV.]

The value of the steamship X. is hereby fixed by consent for the purposes of bonding at the sum of six thousand dollars.

Dated, —, 1890.

L. & K., Proctors for Libelants  
S. & G., Proctors for Claimants.

## FORM IX.—BOND TO MARSHAL.

*District Court of the United States of America for the Eastern District of New York.*

Know all men by these presents that we, X. Y., claimant, and Richard Roe and John Doe, sureties, are held and firmly bound unto A. W., Marshal of the United States for the Eastern District of New York, in the sum of four thousand dollars, to be paid to the said A. W., for the payment

of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 16th day of April, 1891.

Whereas a libel has been filed in the District Court of the United States for the Eastern District of New York, on the 14th day of April, 1891, by J. S., libelant, against the brig Q., for the sum of two thousand dollars, on which process of attachment has issued, and the said brig is in custody of the marshal under the said attachment, and X. Y. has applied for a discharge of said brig from the custody of the marshal, and has filed a claim claiming the said brig as owner, and has filed a stipulation for the claimant's costs, pursuant to the rules and practice of the said Court:

Now, therefore, the condition of this obligation is such, that if the above bounden X. Y., Roe, and Doe, shall abide by and perform the decree of this Court, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

X. Y.	[SEAL.]
RICHARD ROE	[SEAL.]
JOHN DOE	[SEAL.]

Sealed and delivered, and taken and acknowledged, this 16th day of April, 1891, before me,

[SEAL.]

— —, Notary Public.

[Same affidavit as in Form IV.]

#### FORM X.—ORDER APPOINTING APPRAISERS.

At a stated term, etc. Present: The Honorable Charles L. Benedict,  
District Judge.

ROBERT PICKFORD et al.

vs.

THE BARK B., HER TACKLE, ETC. }

Upon the affidavit of — — [or consent of the parties hereto], now, on motion of S. & G., proctors for the owners of said bark B., it is ordered that F. E. M. and A. S. be, and they are hereby, appointed appraisers to appraise the value of the bark B., her tackle, etc., and return the appraisement made to the Clerk of this Court forthwith; [and that before proceeding to make such appraisement said appraisers choose in writing a third person, who shall act with them in case they disagree as to the value of said vessel, that the appraisement be made in the first instance by the two appraisers herein named, and that, in case they cannot agree, then the third person so chosen act with them, and the appraisement of two of said appraisers stand as the appraisement of said vessel.]

#### FORM XI.—NOTICE TO APPRAISERS.

[TITLE.]

SIR: Take notice that you together with A. S. have been appointed appraisers to appraise the value of the bark ——. You will please call at the office of the Clerk of the U. S. District Court, in the City of Brooklyn, at



— o'clock A. M., on the — instant, and take and subscribe the oath required by law.

Yours, &c., B. LINCOLN BENEDICT, Clerk.

To F. E. M.

Dated, Brooklyn, Dec. 1, 1891.

### FORM XII.—OATH OF APPRAISERS.

[TITLE.]

We, the undersigned, having been appointed appraisers to appraise the value of the bark B., do solemnly swear that we will faithfully appraise the same to the best of our skill and ability.

F. E. M.

Subscribed and sworn to, etc.

A. S.

### FORM XIII.—NOTICE OF APPRAISEMENT.

[TITLE.]

The undersigned, having been appointed appraisers to appraise the bark B., her tackle, etc., do hereby give public notice, that they will proceed to appraise said bark at the South Central Wharf, Atlantic Basin, where she now lies, on the 4th instant, at ten o'clock A. M. of that day.

Dated, Brooklyn, Dec. 2, 1891.

F. E. M.,

A. S.,

Appraisers.

### FORM XIV.—REPORT OF APPRAISERS.

[TITLE.]

We, the undersigned, having been duly appointed and sworn as appraisers to appraise the bark B., her tackle, etc., do report that we have examined and appraised said bark, and do find that said bark, her tackle, etc., are worth the sum of \$1400.

All of which is respectfully submitted.

F. E. M.

Dated, Brooklyn, Dec. 4, 1891.

A. S.

### FORM XV.—EXCEPTIONS TO LIBEL.

[TITLE.]

The claimant hereby excepts to the libel herein for insufficiency and indistinctness, in the following respects:—

1. It does not disclose how the steamer C. bore when first seen from the tug E.

2. It does not disclose what lights of the steamer C. were seen from the tug E., and when they were seen and how they bore.

S. & G., Proctors for Claimant.

### FORM XVI.—ANSWER IN ADMIRALTY.

*To the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York:*

J. S. and others, owners and claimants of the steamship T., her engines, etc., as the same are proceeded against on the libel of M. and N. in a cause

of contract civil and maritime, answer said libel and complaint as follows:—

*First.* The claimants admit the partnership of the libelants, and they have no knowledge or information sufficient to form a belief as to the other allegations of the first article of said libel.

*Second.* The claimants admit that on or about the 31st day of December, 1885, at Genoa, Italy, there was shipped in apparent good order and condition by R. & Co. on board said steamship, then lying in said port of Genoa, and bound for the port of New York, 113 iron drums represented to contain glycerine, said to be marked and numbered as alleged in the second article of said libel, and that thereafter the master or agent of said vessel signed bills of lading for said merchandise, wherein and whereby they acknowledged the receipt thereof in apparent good order and condition, and agreed to deliver the same, subject to the exceptions and conditions mentioned in said bills of lading, in the like good order and well conditioned as received, at the port of New York, unto Drexel, Morgan & Company, or assigns, upon the payment of freight agreed upon.

Further answering, the claimants deny each and every other allegation of the second article of said libel.

*Third.* The claimants have no knowledge or information sufficient to form a belief as to the allegations of the third article of said libel, and therefore deny the same.

*Fourth.* The claimants admit that thereafter said vessel sailed from the port of Genoa on her voyage to New York, where she arrived on or about the 27th day of March, 1886, and there delivered said merchandise in the like good order and condition in which the same was received, subject to the exceptions and conditions mentioned in the said bills of lading.

They admit that three of said drums were damaged, and that part of the contents thereof was lost. They admit that payment of the claim of \$150.00 has been demanded of the agents of said steamship, and refused.

Further answering, the claimants deny each and every allegation of the fourth article of said libel not hereinbefore specifically admitted.

*Fifth.* The claimants admit the jurisdiction of this court, and deny the other allegations of the seventh article of said libel.

*Sixth.* Further answering, the claimants allege that said steamship T. is, and was at the times herein mentioned, a British vessel, hailing from —, and sailing under the British flag.

That the drums of glycerine hereinbefore mentioned were well and properly stowed by a competent stevedore in the manner usual and customary at the port of shipment, and were well and sufficiently dunnaged. That a bill of lading was duly given therefor, to which the claimants beg leave to refer and make a part of this their answer, whereby it was stipulated and agreed that said merchandise should be delivered, subject to the exceptions and conditions therein mentioned, from the ship's deck, where the ship's responsibility should cease, . . . at the port of New York, . . . the act of God, the Queen's enemies, . . . loss or damage resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or other persons in the service of the ship, namely, . . . or other

perils of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted; . . . weight, measurement, contents, quality, brand, and value unknown; and not accountable for loss or damage resulting from sweating, leaking, breakage, rust, decay, . . . deterioration in quality, slightness or insufficiency of packages, stowage, or contact with or smell or evaporation from any other goods. And it was further agreed that the ship-owner was "not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice, of which is not given before the removal of the goods." And, "in case of damage, loss, or non-delivery, the ship-owner . . . not to be liable for more than the invoice value of the goods."

That thereafter said vessel with said merchandise on board sailed from the said port of Genoa to the port of Leghorn, thence to Castellamare, thence to Catacolo, thence to Patras, thence to Trieste, and thence to certain Sicilian ports, thence to Naples, thence to Gibraltar, and thence to New York, where she arrived after an unusually long and boisterous passage on or about the 26th day of March, 1886.

That during said voyage said vessel encountered very heavy weather in the Adriatic and Mediterranean and in the Atlantic, which caused the vessel to strain and labor heavily, and roll and pitch and ship large quantities of water, and the cargo to work and strain.

That whatever damage was done to said drums of glycerine resulted from the perils of the seas aforesaid, and is due in no way to any fault or negligence on the part of the claimants, or of the master, officers, or agents of said vessel; all of whom, on the contrary, did everything in their power for the protection and care of said merchandise.

That the said drums in which the said glycerine was packed were of fragile material and brittle metal, entirely insufficient to withstand ordinary sea perils, and that the breaking of said drums was caused by such insufficiency, and by defects thereof, as well as by the bad weather encountered by the said vessel, and by perils of the seas, and by other causes excepted in said bill of lading.

That by the law of the flag of said steamship, as well as by the law of the place of the contract, all of the exceptions of said bill of lading, as above set forth, are valid against the shippers of said merchandise, and against the libelants; and the claimants beg leave to refer to such laws, which they will prove upon the trial hereof.

That all and singular the premises are true.

Wherefore the claimants pray that said libel may be dismissed with costs.

J. S. AND OTHERS,

[Verification.]

By G. BROTHERS, Agents

#### FORM XVII.—PETITION TO BRING IN VESSEL UNDER SUPREME COURT RULE 59.

*To the Honorable Edward T. Green, Judge of the District Court of the United States for the District of New Jersey:*

The petition of John Smith, sole owner of the ship Emily, against the steam-tug Franklin, her engines, etc., and against all persons claiming any

interest therein, in a cause of collision, civil and maritime, alleges as follows:—

*First.* The petitioner was at the times hereinafter mentioned, and is now, the sole owner of the ship Emily, which is a British vessel, hailing from Liverpool, England, of 864 tons register, and was up to the time of the collision hereinafter mentioned tight, staunch, and strong, and in every way seaworthy.

*Second.* [Sets forth facts of collision between ship Emily in tow of tug and a dredge at anchor.]

*Third.* Said collision was not caused or contributed to by any negligence on the part of the petitioner or of those in charge of said ship, but was caused by the negligence of the steam-tug Franklin, in the following respects among others. [Here faults are specified.]

*Fourth.* On or about the 5th day of November, 1888, Richard Roe filed a libel and commenced a suit in this court against said ship Emily, her tackle, etc., only, for damages alleged to have been sustained by said steam dredge by the collision aforesaid, in the sum of \$5000; and on or about the 12th day of November, 1888, the petitioner duly filed in said cause a claim to said ship Emily, her tackle, etc., with the stipulation for costs required by the rules and practice of this Court, and also a stipulation in the sum of \$6500, the agreed value of said ship. Your petitioner has not yet filed his answer to said libel, the process not having yet been returned.

And your petitioner alleges that said steam-tug Franklin, her engines, etc., ought to be proceeded against for said damages in the same suit as said ship.

*Fifth.* Said steam-tug Franklin is now within this district and within the jurisdiction of this Court.

*Sixth.* All and singular the premises are true, and within the jurisdiction of the United States and of this Honorable Court.

Wherefore your petitioner prays that process may issue according to the practice of this Court and the rules of the Supreme Court in Admiralty against the steam-tug Franklin, her engines, etc., to the end that said tug may be proceeded against in this suit for the damage alleged to have been sustained by the libelant Roe, as if said tug had been originally proceeded against herein. And the petitioner further prays that all persons claiming any interest in said tug Franklin may be cited to appear and answer the libel herein and this petition, and that said tug Franklin may be condemned and sold to satisfy the claim of the libelant for damages, if any, with interest and costs, and also the costs of petitioner herein, and that the petitioner may have such other or further relief as may be proper.

Sworn to, etc.

JOHN SMITH.

### FORM XVIII.—INTERLOCUTORY DECREE AND DEFAULT IN ADMIRALTY.

At a stated term, etc. Present: Hon. — —, Judge.

[TITLE.]

The marshal having returned on the monition issued in the above entitled cause that he had attached the said vessel, her tackle, apparel, and



And it is further ordered, adjudged, and decreed that, unless this decree be satisfied, or proceedings thereon be stayed on appeal, within the time limited and prescribed by the rules and practice of this court, the libelants have execution to satisfy this decree, and the stipulators for costs in behalf of the respondent cause the engagements of their stipulation to be performed.

**At a stated term of the District Court of the United States for the Southern District of New York, held at the Court Rooms in the City of New York on the 8d day of April, 1891. Present: Honorable Addison Brown, Judge.**

This cause having come on to be heard upon the pleadings and proofs adduced by the respective parties, and having been argued by the respective advocates, now on motion of D. & F., proctors for the claimant, it is ordered, adjudged, and decreed that the libel herein be and the same hereby is dismissed with costs, and it is further ordered, adjudged, and decreed that John Smith, the claimant above named, recover herein against the libelant the sum of sixty-eight  $\frac{8}{100}$  dollars costs as taxed.

**ADDISON BROWN.**

**At a stated term of the District Court, etc. Present: Hon. — —, Judge.**

The report of the commissioner to whom it was referred to ascertain the damages sustained by the libellant by reason of the matters set forth in the libel having been filed, wherefrom it appears that such damages amount to the sum of three thousand dollars, and exceptions to said re-



port having been filed on the part of the libelant and both the claimants, and such exceptions having been overruled, now, on motion of D. & F., proctors for the libelants, it is

Ordered that said report be, and the same hereby is, in all respects confirmed; and it is further ordered, adjudged, and decreed that the libelant recover herein as damages said sum of three thousand dollars, and as interest thereon from the date of said report the sum of one hundred dollars, and as costs the sum of two hundred dollars, making in all the sum of thirty-three hundred dollars, for which sum said steamboat X., and said steam-tug Y., their engines, etc., are hereby condemned.

And it is further ordered, adjudged, and decreed, that as between said steamboat and said steam-tug the amount so adjudged to the libelant with the accruing interest and charges be paid by the respective claimants of said vessels in equal moieties, and that any portion of either of such moieties which the libelant shall not be able to collect from or enforce against either said steamboat or said steam-tug, or their respective claimants, shall be collected from or enforced against the other.

And it is further ordered, adjudged, and decreed that, unless this decree be satisfied or proceedings thereon be stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the stipulators for costs and value on the part of said vessels cause the engagements of their stipulations to be performed, or show cause within the time prescribed by law why execution should not issue against their goods, chattels, and lands to satisfy this decree.

#### FORM XXV.—FINAL DECREE IN ADMIRALTY FOR SUMMARY JUDGMENT ON BOND TO MARSHAL.

At a stated term, etc. Present: Hon. — —, Judge.

JOHN SMITH  
*against*  
 THE STEAMBOAT X.  
 AND THE STEAM-TUG Y. }

On reading and filing the report of A. B., to whom it was referred to ascertain the damages sustained by the libelant, whereby there is reported due the libelant as such damages the sum of \$3000, and the time to file exceptions to said report having expired, and no exceptions thereto having been filed, now on motion of D. & F., proctors for the libelant, it is

Ordered that said report be in all things confirmed, and that the libelant recover herein against the steamboat X., said sum of \$3000 reported due as aforesaid, with \$100 interest, and \$200 costs, making the sum of \$3300, and that said steamboat X., her engines, etc., be condemned therefor.\*

And it is further ordered, adjudged, and decreed that in pursuance of the Act of Congress passed March 3, 1847, a summary judgment be and the same hereby is entered against R. S., principal, and G. H. and J. K., sureties, on their bond given on the discharge of said steamboat from custody, for the sum of \$6000, the amount of their said bond.

And it is further ordered, adjudged, and decreed, that the libel herein be dismissed as against the steam-tug Y., with costs, and that M. N.,

And it is further ordered, adjudged, and decreed that, unless this decree be satisfied or proceedings thereon stayed on appeal within the time and in the manner prescribed by the rules and practice of this Court, the libelant have execution to enforce satisfaction of this decree as against said steamboat X., and the stipulators for costs on the part of the libelant cause the engagements of their stipulation to be performed, or show cause why execution should not issue against their goods, chattels, and lands to enforce satisfaction of this decree as against the libelant.

[Same as last form to \*.]

And it is further ordered that, unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this Court, the Clerk, after deducting the taxed costs of the officers of Court, distribute the proceeds in satisfaction of this decree, subject to all priorities as they now exist.

**Clerk of the District Court of the United States for the S. D. of N. Y.**

***United States Circuit Court of Appeals for the Second Circuit.***

}

**The petition of A. B., the libellant herein, respectfully shows as follows:—**

2. On or about January 20th, 1891, the claimant duly appeared and filed his answer to said libel, praying that the libel be dismissed with costs, as by reference to said answer will more fully appear.

4. The above named libelant and appellant is advised and insists that said final decree is erroneous, in that it does not decree payment of the libelant's claim with interest and costs.

**S. & G.,**

### Proctors for Appellants.

**At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held in the Court Rooms in the city of New York, on the — day of December, 1891. Present: Honorable WILLIAM J. WALLACE and Honorable E. HENRY LACOMBE, Judges.**

**This cause having come on to be heard on appeal from the decree of the District Court of the United States for the District of Connecticut, entered**

herein —, 1891, now, on motion of D. & F., proctors for the libelant and appellant, it is

Ordered that said decree be, and the same hereby is, reversed, with costs of this Court, and that the costs of the District Court be apportioned, and that a mandate issue to said District Court directing said court to proceed in accordance with the opinion of this Court.

### FORM XXX.—MANDATE IN ADMIRALTY.

UNITED STATES OF AMERICA, ss.

*The President of the United States of America, To the Honorable the Judge of the District Court of the United States for the Southern District of New York, GREETING:*

Whereas, lately in the District Court of the United States for the Southern District of New York, before you, in a cause between J. S., libelant and appellee, and the steamship X., whereof A. B. is claimant and appellant, wherein the decree of said Court is in the words and figures following, viz: [Here state substance of decree of District Court] as by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit by virtue of an appeal taken out by said A. B., agreeably to the Act of Congress in such case made and provided, fully and at large appears:

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this Court that the decree of the District Court be, and the same hereby is, affirmed, with the costs of this Court, amounting to the sum of \$42.25.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,

Clerk of the United States Circuit Court of Appeals  
for the Second Circuit.

Costs of Clerk.....	\$12.90
Printing record.....	4.35
Attorney.....	25.00
	<hr/>
	\$42.25

### FORM XXXI.—FINAL DECREE ON MANDATE IN ADMIRALTY.

At a stated term of the District Court, etc. Present: Honorable —  
—, Judge.

[TITLE.]

The decree of this court entered herein July 7, 1891, having been affirmed on appeal to the United States Circuit Court of Appeals for the Second

Circuit, as appears from the mandate of said court filed herein December 12, 1891, now, on motion of D. & F., proctors for the libelant and appellee, it is

Ordered, adjudged, and decreed that the libelant above named recover herein the sum of \$—, damages, and the further sum of \$—, interest thereon from the date of the report of the commissioner herein, and the further sum of \$—, costs of this court, and the further sum of \$42.25, costs of said Court of Appeals, making in all the sum of \$—, for which sum the above-named vessel, her tackle, etc., are hereby condemned.

And it is further ordered, adjudged, and decreed that the stipulators for costs and value on the part of the claimant and the sureties on the bond given on appeal herein cause the engagements of their stipulations and bond to be performed, or show cause why execution should not issue against their goods, chattels, and lands in satisfaction hereof.

#### FORM XXXII.—LIBEL OF PETITION FOR LIMITATION OF LIABILITY.

*To the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York:*

The libel and petition of the T. Steamship Company, owner of the steamship D., in a cause of action, civil and maritime, respectfully shows:—

*First.* Your petitioner is a corporation duly created and organized by and under the laws of the kingdom of —, having its principal office at —, and owns and runs a line of steamships for the carriage of cargo and passengers between German ports and the port of New York, known as the T. Line. At the times hereinafter mentioned your petitioner was the owner of said steamship D., which was engaged in the business of carriage of cargo and passengers in said line as aforesaid.

*Second.* On the 20th day of March, 1889, said steamship D., having on board a large general cargo and about 500 passengers, and being fully manned with a large and competent crew, under command of an experienced master with a full corps of efficient officers, left the port of H. bound on a voyage to New York *via* the ports of C. and D. After touching at said ports, and taking on more passengers and cargo and ship's coals, said steamship left D. for New York on March 26th. passing Dennis Head on the 27th, and through Pentland Frith on the following day, whence all went well with said vessel until the 2d of April, when a storm came up, and for two days the vessel labored heavily in the seas. On the morning of the 4th the high seas continued, and finally, at 3:30 P. M., when in latitude 46° 28' and longitude 40° 6', a shock was felt throughout the ship. The engines were stopped instantly, and upon investigation it was found that the stern section of the propeller shaft had broken in the stern tube, and that at the same time the stern bulkhead was broken into and rivets started, letting in a large quantity of water. All the pumps were worked, the sails set. The pumps were kept going, but were unable to keep the water under control. The pumps were worked by steam, and the other compartments of the vessel kept empty; but the water continued to rise in the engine-room. A portion of the cargo was jettisoned without avail. The water in the after hold rose to a depth of three feet. The sea was still

high. The storm continued, and the steamer labored heavily, and began noticeably to settle lower aft.

At daylight on the 6th of April the steamship M. was sighted. She promptly offered assistance. Her commander undertook to tow the D. to the nearest land, which was the Azores. The M. accordingly began towing. The leak in the D. increased so rapidly that at 11 A. M. her passengers were begun to be transferred to the M., which was concluded at 4 P. M. The captain of the M. then declined to tow the D. longer, after the passengers had been transferred; and as the leak was increasing, the captain and crew of the D. were compelled for their own safety to abandon the vessel, which was done; and thereafter said vessel, together with all her tackle, apparel, boats, and appurtenances has become a total loss, and no freight moneys have been earned, paid, or received therefrom.

Said accident happened, and the loss, damage, injury, and destruction above set forth were occasioned, done, and incurred without fault or privity or knowledge of your petitioner, and without the fault of any of its officers, agents, or servants, but were due solely to perils of the seas.

*Fourth.* Nevertheless certain persons claiming to have been passengers on said vessel, and persons claiming to have lost passengers' luggage or baggage upon the D., have already brought suit against your petitioner, and other suits are threatened. On the 6th day of May, 1889, one X. Y. commenced an action against your petitioner in the Supreme Court of the State of New York for the City and County of New York, within the Southern District of New York, to recover damages for alleged loss or destruction of luggage upon said steamship; and said action is still pending, the plaintiff's attorney being J. S., Esq., whose office is at —, in the City of New York. Your petitioner desires to contest its liability for the loss, destruction, damage, and injury occasioned by said accident, and also to claim the benefit of the limitation of liability provided in the third and fourth sections of the Act of Congress, entitled "An Act to limit the liability of ship-owners and for other purposes," passed March 3, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the various statutes in addition thereto and amendatory thereof,<sup>1</sup> [and is ready and willing to transfer any interest or *spes recuperandi* in the steamship D. for the benefit of all such claimants to a trustee to be appointed by this Honorable Court, although, as this petitioner is advised and believes, said steamship D. and her freight moneys, and her tackle and apparel, are now and have been a total loss.]

*Fifth.* Your petitioner further states the facts and circumstances by reason of which exemption from liability is claimed, as follows, in addition to the facts hereinbefore alleged:—

That the said steamship D. was in all respects sound, staunch, and seaworthy, and properly manned and equipped, and provided for the voyage in which she was engaged, and under command of proper and suitable officers.

<sup>1</sup> Or in case of an appraisement, "and to that end desires an appraisement to be had of the amount or value of its interest in said steamship in the condition in which she was after said accident and damage on —, 1889, and of her freight then pending; and for that purpose your petitioner asks that said steamship be examined and her value ascertained by a commissioner of the Circuit Court, or by such other means as the court shall direct."



That said accident occurred through no fault or negligence on the part of the persons on board of or having charge of the navigation of the said steamship D., but was wholly due to the perils of the seas, the severity of the storm, and the action of the elements in breaking the shaft of said steamer within the stern tube, whereby the stern bulkhead was broken and started and a leak made so that it become impossible to repair her, which finally caused her to be abandoned by her passengers, officers, and crew.

That said steamship D. has not been libeled or arrested in any court to answer for said loss or destruction, but that the owners have been sued within the Southern District of New York, as aforesaid.

That your petitioner is ignorant of the amount of the losses and injuries suffered by the several freighters and owners of merchandise upon said voyage.

Wherefore your petitioner prays that this Honorable Court<sup>1</sup> will issue a monition against all persons claiming damages for any loss, destruction, damage, or injury occasioned by said accident, citing them to appear before this court and make due proof of their respective claims, at a time to be therein named; as to all which claims your petitioner will contest its liability, independently of the limitation of liability claimed under the act and statute aforesaid.

Also that the Court will designate a commissioner before whom proof of all claims presented in pursuance of such monition shall be made; and that, upon the coming in of the report of said commissioner and upon the hearing of the cause, if it shall appear that the petitioner is not liable for such loss, damage, destruction, and injury, it may so finally be decreed by this Court. And that in the mean time and until the final judgment of the Court shall be rendered herein, this Court will make an order restraining the further prosecution of all and any suit or suits against the petitioner, in respect to any such claim or claims, particularly by the said X. Y., who brought suit in the Supreme Court of the State of New York as hereinbefore specified; and the petitioner will ever pray, etc.

### FORM XXXIII.—ORDER FOR TRANSFER TO TRUSTEE.

At a stated term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms in the City of New York on the 25th day of June, 1889. Present: Honorable ADDISON BROWN, District Judge.

IN THE MATTER OF THE PETITION OF THE  
T. STEAMSHIP COMPANY AS OWNER OF  
THE LATE STEAMSHIP D. }

Upon reading and filing the libel and petition of the T. Steamship Company as owner of the late steamship D., showing that it has been sued as

<sup>1</sup> In case of appraisement, here insert "will be pleased to cause due appraisement to be had of the value of said steamship D. in the condition in which she was immediately after said accident, and is now, and, upon the ascertainment of said value, make an order for payment thereof into court, or for the giving of a stipulation, with sureties for payment thereof into court whenever the same shall be ordered, and."

such owner by one X. Y., claiming to have been owner of certain passengers' baggage lost and destroyed on such vessel at the time of the abandonment of said steamship on the 6th day of April, 1889, to recover for such loss, destruction, damage, and injury; and that other actions are threatened against said petitioner, and that the whole value of said vessel and her freight has been totally lost, and that the same is therefore not sufficient to make compensation to each of the freighters and owners therefor; and that such loss, destruction, damage, and injury was done, occasioned, and incurred without the privity or knowledge of such owner, and that said petitioner desires to claim the benefit of the limitation of liability provided for in the third and fourth sections of the Act of Congress, entitled "An Act to limit the liability of ship-owners and for other purposes," passed March 8, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the various statutes in addition thereto and amendatory thereof, and also to contest its liability and the liability of said vessel for said loss, destruction, damage, and injury, independently of the limitation and liability claimed under said Act, said libel and petition also stating the facts and circumstances on which such exemption from limitation of liability are claimed, and praying proper relief in the premises in that behalf, and the said owner having elected to make a transfer as hereinafter provided,

It is hereby ordered, in conformity with said Act of Congress and the statutes amendatory thereof and the Rules of the Supreme Court of the United States made in pursuance thereof, that said T. Steamship Company transfer its interest in the late steamship D. and her freight for the said voyage, for the benefit of all such claimants, to Samuel H. Lyman, Esquire, of the City of New York, who is hereby appointed, pursuant to the provisions of the fourth section of said act, to be trustee for the person or persons who may prove to be legally entitled thereto.

ADDISON BROWN.

#### FORM XXXIV.—TRANSFER TO TRUSTEE.

*District Court of the United States for the Southern District of New York.*

IN THE MATTER OF THE PETITION OF THE  
T. STEAMSHIP COMPANY AS OWNER OF  
THE STEAMSHIP D., FOR LIMITATION OF  
LIABILITY.

WHEREAS, a petition has been filed by the above-named petitioner as owner of the late steamship D. praying for a limitation of its liability in respect of such vessel; and whereas, by an order duly made herein, Samuel H. Lyman, Esq., has been appointed trustee, to whom the petitioner's interest in said steamship and her freight is directed to be transferred for the benefit of the claimants thereto:

Now, therefore, in consideration of the premises, and in compliance with the said order of this Honorable Court, the T. Steamship Company of — above named, by its agents thereunto duly and lawfully authorized, in pursuance of the Act of Congress of the United States entitled "An Act to limit the liability of shipowners, and for other purposes," passed

March 3, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the several statutes amendatory and supplemental thereof, and in compliance with the rules of the Supreme Court of the United States made in pursuance thereof, does hereby grant, assign, transfer, and set over absolutely all its right, title, interest, and property in and to said steamship known as the D., her engines, boilers, tackle, apparel, and furniture, or any savings, remnants, or wreckage of said steamship, her engines, boilers, tackle, apparel, and furniture, and in and to the freight of the said steamship for her last voyage in said petition mentioned whether now or hereafter obtained, unto Samuel H. Lyman, Esq., as trustee appointed by the said order of the District Court as aforesaid, to have and to hold the same to him and his successors for the proper uses and offices of his said office of trustee. Power is hereby granted and conveyed to the said Samuel H. Lyman, Esq., trustee as aforesaid, and his successors in office, to make and enforce, by such actions at law or otherwise as may be necessary, all claims and demands of said T. Steamship Company for said steamship, her remnants, and freight.

In witness whereof said T. Steamship Company has subscribed these presents by its general agents for the United States, at the City of New York, on the twenty-fifth day of June in the year one thousand eight hundred and eighty-nine.

Taken and acknowledged in the presence of — —.

### FORM XXXV.—ORDER FOR MONITION.

At a stated term, &c. Present: Hon. — —, District Judge.

[TITLE.]

On reading the libel and petition herein, verified and filed on June 25th, 1889, for limitation of the liability of the petitioner above named, and it appearing therefrom that the steamship D. broke her shaft and was finally abandoned at sea on April 6th, 1889, and that said vessel and the cargo thereon became a total loss; and said petitioner, as owner of the D., also contesting its liability and the liability of said steamship for said loss, destruction, damage, and injury, independently of the limitation of liability claimed, and said libel and petition having stated the facts and circumstances by reason of which exemption from and limitation of liability are claimed;<sup>1</sup> [and on reading the order of this court dated the 25th day of June, 1889, whereby it has been ordered that said petitioner transfer its interest in said steamship and her freight for the voyage in said libel and petition mentioned to Samuel H. Lyman, Esquire, to act as trustee for the person or persons who may prove to be legally entitled thereto, pursuant

<sup>1</sup> In case of appraisement: "and the amount or value of the interest of the petitioner in the steamship —, her engines, etc., immediately after the accident sustained by her on the — day of —, 18—, having been duly appraised at the sum of — dollars, as appears from the order entered herein on the — day of —, 18—, and there being no freight pending on the voyage of said steamship —, on said — day of —, 18—, and the petitioner having duly given a stipulation, with sureties, for the payment of said amount into court whenever the same shall be ordered, and said stipulation having been duly approved by the court, now, on motion of D. & F., proctors for the petitioner."

to the provisions of the act of Congress and the statutes amendatory thereof in said libel and petition referred to; and upon reading and filing the instrument of transfer duly executed by said petitioner by his authorized agents, bearing date the 25th day of June, 1889, whereby it appears that the petitioner's interest in such vessel and freight have been transferred to such trustee, pursuant to such order and the said statutes and the rules of the Supreme Court of the United States in that behalf; upon motion of D. & F., proctors for said petitioner,] it is

Ordered that a monition issue, out of and under the seal of this court, against all persons claiming damages for any loss, destruction, damage, or injury occasioned by the disaster to said steamship B. and her subsequent abandonment referred to in said petition, citing them to appear before this court and make due proof of their respective claims, at or before the 10th day of October, 1889, at eleven o'clock in the forenoon; and Samuel H. Lyman, Esquire, a commissioner of the United States Circuit Court, is hereby designated as the commissioner before whom such claims shall be presented in pursuance of said monition.

It is further ordered that public notice of such monition be given by the United States marshal for this district, in a newspaper, for the space of fourteen days and thereafter once in each week until the 10th day of October, 1889; and that a copy of such monition and of this order be personally served on the attorneys, proctors, or solicitors of record for the plaintiffs or libelants in each of the suits brought and pending in any court in the United States against said T. Steamship Company, to recover for any such damages, such service to be made at least one month prior to the said 10th day of October, 1889.

It is further ordered that the prosecution of all or any suit or suits, actions, or proceedings against the T. Steamship Company, in respect of any claim for damages for any loss, destruction, damage, or injury occasioned by said disaster to the steamship D., or her loss and abandonment, be, and the same hereby is, restrained.

It is further ordered that any person claiming damages as aforesaid, who shall have presented his claim to said commissioner under oath, shall be at liberty, on or before said last named date, or within such further time as this court may grant, to answer the libel and petition herein, and to contest the right of the petitioner either to the limitation of liability or exemption from liability, or to both of said reliefs, as prayed for in said petition.

#### FORM XXXVI.—MONITION.

SOUTHERN DISTRICT OF NEW YORK, ss.

*The President of the United States of America to the United States Marshal for the Southern District of New York, GREETING:*

Whereas a libel and petition was filed in the District Court of the United States for the Southern District of New York, on the 25th day of June, 1889, by the T. Steamship Company, as owner of the steamship D., praying for a limitation of its liability concerning the loss, destruction, damage, and injury occasioned by the disaster to and abandonment of said steamship on the 6th day of April, 1889, for the reasons and causes in said libel

and petition mentioned, and praying a monition of the said Court in that behalf to be issued, and that all persons claiming damages for any such loss, destruction, damage, or injury may be thereby cited to appear before said Court and make due proof of their respective claims, and, all proceedings being had, that if it shall appear that the said petitioner is not liable for any such loss, destruction, damage, or injury, it may be so finally decreed by this Court:

<sup>1</sup>[And whereas the interest of the said petitioner in the steamship D. and her freight then pending has been duly transferred to Samuel H. Lyman, Esquire, as trustee, in compliance with the order of this court,] and the said Court has ordered that a monition issue against all persons claiming damages for said loss, destruction, damage, or injury, citing them to appear and make due proof of their respective claims;

You are therefore commanded to cite all persons claiming damages for any loss, destruction, damage, or injury occasioned by said disaster to and abandonment of the said steamship, to appear before said Court and make due proof of their respective claims before Samuel H. Lyman, Esquire, a commissioner of the United States Circuit Court, at his office, in the United States Court and Post Office Building, on or before the 10th day of October, 1889, at 11 o'clock in the forenoon. And what you shall have done in the premises do you then make return thereof to this court, together with this writ.

Witness the Honorable ADDISON BROWN, Judge of the said Court, at the city of New York, in the Southern District of New York, this 25th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and thirteenth.

[SEAL.]

SAMUEL H. LYMAN, Clerk.

D. & F., Proctors for Libelant and Petitioner.

### FORM XXXVII.—FINAL DECREE IN PROCEEDINGS FOR LIMITATION OF LIABILITY IN ADMIRALTY.

At a stated term, &c. Present: The Honorable — —, District Judge.  
IN THE MATTER OF THE LIBEL AND PETITION

OF

THE T. STEAMSHIP COMPANY, AS OWNER OF  
THE STEAMSHIP D., ETC., FOR LIMITATION  
OF LIABILITY.

} Final Decree.

A libel and petition of said T. Steamship Company having been filed in this Court, showing that it is the owner of the late steamship D., which broke its shaft and was abandoned on the high seas, on the 6th day of April, 1889, resulting in the total loss of said vessel with the cargo laden thereon; and it further appearing therefrom that at the time of filing said

<sup>1</sup>Or, "And whereas the value of the interest of the said petitioner in said steamship has been duly appraised at the sum of — dollars, and there was no freight pending on the voyage of said steamship on said — day of —, 18 —, and a stipulation for the payment into court of the value of the interest of the said petitioner in said steamship has been given."

libel and petition various actions were threatened by certain passengers thereon, and that one suit was pending against the petitioner by one X. Y. as plaintiff, in the Supreme Court of the State of New York, in the City and County of New York, within the Southern District of New York, to recover for loss, damage, and destruction of baggage shipped or put on board said steamship, and it also appearing that such loss, damage, injury, and destruction of property were occasioned without the privity or knowledge of said petitioner, and that said petitioner desires to claim the benefit of the limitation of liability provided for in the Act of Congress of the United States entitled "An Act to limit the liability of shipowners, and for other purposes," passed March 3d, 1851, now embodied in §§ 4283 to 4285 of the Revised Statutes, and the several acts and statutes amendatory thereof and supplemental thereto; and said petitioner having contested any and all liability in respect to said loss, destruction, damage, and injury (independently of the limitation of liability claimed), and said libel and petition having stated the facts and circumstances by reason of which exemption from liability is claimed; and an order of this Court having been made thereon dated the 25th day of June, 1889, whereby it was ordered that the said petitioner transfer its interest in said steamship and her freight for the voyage in said libel and petition mentioned to Samuel H. Lyman, Esquire, to act as trustee for the person or persons who may prove to be legally entitled thereto, pursuant to the provisions of the said Act of Congress of the United States, and the statutes amendatory thereof and supplemental thereto; and the petitioner having duly complied with said order, and having made said transfer to said trustee, as appears by the instrument of transfer duly executed by said petitioner to said trustee, bearing date the 25th day of June, 1889; and an order having been also made dated on said 25th day of June, 1889, directing a monition to issue out of and under the seal of this Court, citing all persons claiming damages for the loss, destruction, damage, and injury, to appear before this court and make due proof of their respective claims, with liberty also upon making proof to answer said libel and petition; and a monition having been thereupon, and on the said twenty-fifth day of June, duly issued in pursuance of said last mentioned order, and the said monition having been duly returned by Martin T. McMahon, the marshal of the United States for the Southern District of New York, with proof of due personal service of said monition on the attorney of record for X. Y., the plaintiff in the suit brought and pending against said petitioner, and also due proof of the giving of due notice of said monition by publication in conformity with the directions in said last mentioned order. And on the return of said monition proclamation having been duly made for all persons claiming damages for any loss, destruction, damage, or injury occasioned by the disaster above referred to, to appear and present their claims, and such answers or exceptions as they should be advised, and no person having appeared, and no answer or exceptions having been filed, and the default of all persons having been duly noted. And a report having been duly rendered and filed by Samuel H. Lyman, Esquire, commissioner appointed in this proceeding as aforesaid, which report bears date the first day of November, 1889,



from which it appears that no claims have been presented to him by any person or parties whatsoever, and it further appearing from said report and the testimony filed therewith that said steamship D. was lost and abandoned at sea on April 6th, 1889, and that the circumstances of said disaster have been correctly set forth in the libel and petition herein, and that said loss and disaster were done and occasioned without fault, privity, or knowledge of the petitioner herein, or of any of its servants, but were due solely to perils of the seas; and that at the time of starting upon said voyage from H., said steamship was in good condition, and was in every respect fully manned and equipped; and it being also reported by said commissioner that the petitioner herein is entitled to the benefit of the limitation of liability provided for in the Act of Congress of the United States, entitled "An Act to limit the liability of shipowners and for other purposes," passed March 8th, 1851, now embodied in sections 4283 to 4285 of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplemental thereto; and the said Samuel H. Lyman, as trustee, having also made and filed his report as such trustee, wherein he finds and reports that said steamship D. has become a total loss, and that nothing has been received or recovered therefrom, and that no freight moneys have been earned, paid, or received therefrom, and that nothing has therefore come to him or is recoverable by him, as such trustee, and said reports coming on to be heard, now upon motion of D. & F., proctors for the petitioner,

It is ordered that said several reports of Samuel H. Lyman, Esquire, as commissioner and as trustee, be, and they each are hereby, in all things confirmed; and that the defaults of all and every persons and parties thereto be, and the same hereby are, entered herein, and that the allegations of said libel and petition stand as confessed and admitted.

It is further ordered, adjudged, and decreed that said petitioner, the T. Steamship Company, as owner of the late steamship D., is entitled to the benefit of the limitation of liability provided for in the Act of Congress of the United States, entitled "An Act to limit the liability of shipowners and for other purposes," passed March 8th, 1851, now embodied in sections 4283 and 4285 of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplemental thereto.

And it is further ordered, adjudged, and decreed that said libellant and petitioner be, and it hereby is, forever discharged from all and every claim or demand arising from or growing out of said disaster to the said steamship D., or out of the loss and abandonment of said vessel, and the loss or injury to any cargo, property, effects, and goods then laden thereon.

It is further ordered that said X. Y., his agents, attorneys, proctors, and counsel, refrain from the further prosecution of said action begun by him against the petitioner to recover for the loss, destruction, and injury as aforesaid.

It is further ordered that all other persons whomsoever claiming, or who may hereafter claim, for any loss, destruction, damage, or injury occasioned by said disaster to the steamship D., or by her loss and abandonment, be, and the same hereby are, perpetually restrained and enjoined

from bringing, commencing, or instituting, or further prosecuting any suit or suits or proceedings whatever, upon any cause of action whatsoever, against the T. Steamship Company, for any loss, damage, or injury done, suffered, or occasioned by reason of the loss and abandonment of said steamship D., as aforesaid.

And it is further ordered that this decree be served within the Southern District of New York, in the usual manner, and within any district or districts of the United States other than the Southern District of New York, by the United States marshal for such other district or districts respectively, by delivering a copy of such original decree and exhibiting a certified copy thereof to the party or person to be served.

ADDISON BROWN.

## II.

### RECENT IMPORTANT STATUTES.

Judiciary Act of 1875, as amended in 1897 and 1898, Acts of Fiftieth Congress, Sess. I, ch. 866, approved August 18th, 1888; 25 St. at L. p. 433: —

CHAP. 866.—An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled “An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March third, eighteen hundred and seventy-five.”

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act approved March third, eighteen hundred and eighty-seven, entitled “An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, approved March third, eighteen hundred and seventy-five,” be, and the same is hereby, amended so as to read as follows:

*“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first section of an act entitled ‘An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes,’ approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action

before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

That the second section of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court,

to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

That section three of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State; and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall

give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or for cases for winding up the affairs of any such bank.

SEC. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

SEC. 6. That the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other pur-



poses," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act.

SEC. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

UNAMENDED SECTIONS OF JUDICIARY ACT OF MARCH 3, 1875;  
18 ST. AT L. 470.

SEC. 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court, shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced; and all bonds, undertakings, or security given by either party in such suit, prior to its removal, shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders and other proceedings had in such suit prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC. 5. That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

SEC. 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

SEC. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said

twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf. That if the clerk of the State court in which any such cause shall be pending, shall refuse any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States, to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court. And the circuit court to which any cause shall be removable under this act, shall have power to issue a writ of *certiorari* to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof, the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

SEC. 8. That when in any suit, commenced in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property, within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been

served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit under the jurisdiction of the court therein, within such district, and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State: *Provided*, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring a writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

ACTS OF FIFTY-FIRST CONGRESS, SESS. II, CH. 517, AS AMENDED BY  
27 STAT. AT L. 183; 28 STAT. AT L. 666; 29 STAT. AT L. 536;  
31 STAT. AT L. 660.

An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall consti-

tute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in each circuit court of appeals shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this act: *Provided*, that the costs and fees so fixed by any court of appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court. Each circuit court of appeals shall, within three months after the fixing and establishing of costs and fees as aforesaid, transmit said table to the Chief Justice of the United States, and within one year thereof the Supreme Court of the United States shall revise said table, making the same, so far as may seem just and reasonable, uniform throughout the United States. The table of fees, when so revised, shall thereupon be in force for each circuit; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court. The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SEC. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate of the Supreme Court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cin-

cinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme

Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 7. Where, upon a hearing in equity in a district court or a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court or by the appellate court or judge thereof during the pendency of such appeal: provided further, that the court below may in its discretion require, as a condition of the appeal, an additional bond.

SEC. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the Attorney-General of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided, however,* That in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the Attorney-General of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts.



**SEC. 10.** That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a circuit or district court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

**SEC. 11.** That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed: *Provided, however,* That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeal and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

**SEC. 12.** That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

**SEC. 13.** Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

**SEC. 14.** That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

**SEC. 15.** That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the

same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

**ACT OF FIFTY-FOURTH CONGRESS, SESS. I., CH. 14; 29 ST. AT L. 6.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the jurisdiction of the United States circuit court of appeals for the eighth judicial district be, and is hereby, extended to all suits at law or equity now pending therein upon writ of error to or appeal from the United States court in the Indian Territory in all cases wherein such writ of error or appeal would have vested jurisdiction in said circuit court of appeals, but for the act of Congress approved March first, eighteen hundred and ninety-five, entitled "An Act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes."

### III.

## RULES OF PRACTICE IN EQUITY.

### *Preliminary Regulations.*

1. The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2. The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3. Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

4. All motions, rules, orders, and other proceedings, made and directed at chambers or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office-hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6. All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

### *Process.*

7. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9. When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10. Every person, not being a party in any cause, who has obtained an

order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

### *Service of Process.*

11. No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12. Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

[As amended Dec. 17, 1900, 180 U. S. 641.]

13. The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

14. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

15. The service of all process, mesne and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16. Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

### *Appearance.*

17. The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

*Bills taken Pro Confesso.*

18. It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19. When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

*Frame of Bills.*

20. Every bill in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," &c.

21. The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the nar-



rative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25. In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

### *Scandal and Impertinence in Bills.*

26. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27. No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court

for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

### *Amendment of Bills.*

28. The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29. After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30. If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

### *Demurrers and Pleas.*

31. No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and, if a plea, that it is true in point of fact.

82. The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

83. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

84. If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

85. If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

86. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

87. No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

88. If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.

### *Answers and Discovery.*

89. The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support

of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40. A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

### DECEMBER TERM, 1850.

*Ordered*, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41. The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," &c.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

### DECEMBER TERM, 1871.

#### *Amendment to 41st Equity Rule.*

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 8 of the act of Congress of July 2, 1864.

42. The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alter-

ation in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

43. Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say —

"1. Whether, &c.

"2. Whether, &c."

44. A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of any interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

### *Parties to Bills.*

47. In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48. Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49. In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51. In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52. Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following, (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53. If the defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

54. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

### *Injunctions.*

55. Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or



answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

### *Bills of Revivor and Supplemental Bills.*

56. Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties, entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57. Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58. It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

### *Verification of Answers.*

[As amended in October term, 1888, 129 U. S. 701.]

59. Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.

### *Amendment of Answers.*

60. After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference

to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

### *Exceptions to Answers.*

61. After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62. When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63. Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64. If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

65. If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing

party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

### *Replication and Issue.*

66. Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

### *Testimony and Depositions.*

67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commission or commissioners may be named by the court, or by a judge thereof, and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so requests, shall be furnished with a copy of the pleadings. Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examination shall be reduced to writing by the examiner in the form of question put and answer given, provided that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative. At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically, shall be put into typewriting or other writing, provided that such stenographer or typewriter has been appointed by the court or is approved by both parties. The testimony of each witness, after such reduction to writing, shall be

read over to him and signed by him in the presence of the examiner, and of such of the parties or counsel as may attend, provided that, if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition; but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just. In case of refusal of witnesses to attend to be sworn, or to answer any question put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories. Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause. When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in Section 865 of the Revised Statutes. Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time or to a judge in vacation, for special reasons satisfactory to the court or judge. Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties or by leave of court first obtained, on motion for cause shown. The expense of the taking down of depositions by a stenographer, and of putting them into typewriting or other writing, shall be paid in the first instance by the party calling the witness, and shall be imposed by the court as part of the costs upon such party as the court shall adjudge should ultimately bear them.

“Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court, on final hearing.”

[As amended May 2, 1892, 144 U. S. 689, and May 15, 1893, 149 U. S. 793.]

68. Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

69. Three months, and no more, shall be allowed for the taking of testi-

mony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

70. After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

71. The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

### *Cross-bills.*

72. Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

### *Reference to and Proceedings before Masters.*

73. Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

74. Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall

be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75. Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

76. In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

77. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained



shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

80. All affidavits, depositions, and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

81. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

82. The circuit courts may appoint standing masters in chancery in their respective districts, (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment); and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

[As amended April 16, 1894, 152 U. S. 709.]

### *Exceptions to Report of Master.*

83. The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84. And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the circuit court.

*Decrees and Orders.*

85. Clerical mistakes in decrees or decretal orders, or errors arising from any incidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

86. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [Here insert the decree or order.]

*Guardians ad Litem.*

87. Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

*Rehearings.*

88. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

*General Provisions.*

89. The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, *mesne* and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same. Amended April 16, 1894, 152 U. S. 710.

90. In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91. Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

#### DECEMBER TERM, 1863.

92. *Ordered*, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

#### OCTOBER TERM, 1878.

##### *Injunctions.*

93. When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

#### OCTOBER TERM, 1881.

##### *Stockholders' Bills.*

94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

## IV.

### RULES OF PRACTICE FOR THE COURTS OF THE UNITED STATES IN ADMIRALTY AND MARITIME JURISDICTION, ON THE INSTANCE SIDE OF THE COURT.

IN PURSUANCE OF THE ACT OF THE TWENTY-THIRD OF AUGUST, 1842, CHAPTER 188.

1. No *mesne* process shall issue from the district court in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2. In suits *in personam*, the *mesne* process may be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*; or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a single monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

3. In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

4. In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation summary process of

execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

5. Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

6. In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

7. In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

8. In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

9. In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

10. In all cases where any goods or other things are arrested, if the same are perishable or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

11. In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under direction of the court, upon the claimant's depositing in court so much money as the court shall order, upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.

12. In all suits by material-men for supplies or repairs, or other necessities, the libelant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

13. In all suits for mariners' wages, the libelant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*.

14. In all suits for pilotage the libelant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone *in personam*.

15. In all suits for damage by collision, the libelant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*.

16. In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

17. In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libelant may proceed either *in rem*, or against the master or the owner alone *in personam*.

18. In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer.

19. In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

20. In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.



21. In all cases of a final decree for the payment of money, the libelant shall have a writ of execution, in the nature of a *fleri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

22. All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

23. All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession or otherwise, as the case may be; and, if the libel be *in rem*, that the property is within the district; and, if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libelant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

24. In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libelant.

25. In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

26. In suits *in rem*, the party claiming the property shall verify his claim

on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.

27. In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.<sup>1</sup>

28. The libelant may except to the sufficiency, or fulness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

29. If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

30. In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libelant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

31. The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.

32. The defendant shall have a right to require the personal answer of the libelant upon oath or solemn affirmation to any interrogatories which

<sup>1</sup> *Vide post*, 48th Rule, p. 1416.

he may, at the close of his answer, propound to the libelant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libelant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libelant to such interrogatories, the court may adjudge the libelant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

83. Where either the libelant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

84. If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

85. The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

86. Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

87. In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libelant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

88. In cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exi-

gency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

39. If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

40. The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

41. All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

42. All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks, signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

43. Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

44. In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

45. All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the

particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

46. In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

47. In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State courts.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, upon similar or analogous process issuing from a State court.

48. The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

49. Further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

50. When oral evidence shall be taken down by the clerk of the district court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

51. When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may

amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

[As amended January 27, 1896, 160 U. S. 693.]

52. The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:—

1. The style of the court.
2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.
3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.
4. The libel, with exhibits annexed thereto.
5. The pleadings of the defendant, with the exhibits annexed thereto.
6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.
7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.
8. Any order of the court to which exception was made.
9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.
10. The final decree.
11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:—

- (1) The continuances.
  - (2) All motions, rules, and orders not excepted to which are merely preparatory for trial.
  - (3) The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.
2. The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.



8. Hereafter, in making up the record to be transmitted to the circuit court on appeal, the clerk of the district court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

53. Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

54. When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 8, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice reserved through the post-office, or otherwise, as the court in its discretion may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

55. Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or contro-

vert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exception thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

56. In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

57. The said libel or petition shall be filed and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinafter provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

58. All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts upon appeal from the district courts.

59. In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claim-

ant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libelant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libelant.

## V.

# RULES OF THE SUPREME COURT OF THE UNITED STATES.

### *1. Clerk.*

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice, either as attorney or counsellor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court, except as provided by Rule 10.

### *2. Attorneys and Counsellors.*

1. It shall be requisite to the admission of attorneys and counsellors to practice in this court, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz.:

I, — — —, do solemnly swear [or affirm] that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

### *3. Practice.*

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

### *4. Bill of Exceptions.*

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

### 5. *Process.*

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames of the parties.

[As amended December 17, 1900, 180 U. S. 641.]

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

### 6. *Motions.*

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket

shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

### *7. Law Library.*

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

### *8. Writ of Error, Return, and Record.*

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.



[Ordered by the court that Subdivision 5 of Rule 8 of this court be amended so as to read as follows:]

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

[Thus amended 137 U. S. 710.]

### *9. Docketing Cases.*

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return-day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule unless by order of the court.

[Ordered by the court that Subdivision 2 of Rule 9 of this court be amended so as to read as follows:]

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court, and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

[Ordered by the court that Subdivision 4 of Rule 9 be amended so as to read as follows:]

4. In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of errors and appeals, from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, and Idaho.

[This amended 137 U. S. 710, 711.]

*10. Printing Records.*

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1st, 1884, the case shall be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, Section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing in the parts designated by

the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk, under Rule 24, Section 7, shall be computed as at present, in the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

[As amended March 28, 1887.]

### *11. Translations.*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceedings, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

### *12. Further Proof.*

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however,* That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

### *13. Objections to Evidence in the Record.*

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

*14. Certiorari.*

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

*15. Death of a Party.*

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: *Provided, however,* That a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered

said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: *Provided, however,* That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: *And provided, also,* That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding such suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also,* That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

#### *16. No Appearance of Plaintiff.*

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

#### *17. No Appearance of Defendant.*

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

#### *18. No Appearance of Either Party.*

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

#### *19. Neither Party Ready at Second Term.*

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

#### *20. Printed Arguments.*

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the

same within the first ninety days of the term, and, in addition, appeals from the Court of Claims may be submitted by both, within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counsellors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

### *21. Briefs.*

1. The counsel for the plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated —

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.



4. When there is no assignment of error, as required by Section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

[As amended December 11, 1893; 150 U. S. 713.]

### *22. Oral Arguments.*

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: *Provided, always,* That a fair opening of the case shall be made by the party having the opening and closing arguments.

### *23. Interest.*

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

[As amended, 133 U. S. 711.]

### *24. Costs.*

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 8d, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:— For docketing a case and filing and indorsing the transcript of the record, five dollars. For entering an appearance, twenty-five cents. For entering a continuance, twenty-five cents. For filing a motion, order, or other paper, twenty-five cents. For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words. For transferring each case to a subsequent docket and indexing the same, one dollar. For entering a judgment or decree, one dollar. For every search of the records of the court, one dollar. For a certificate and seal, two dollars. For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid. For an admission to the bar and certificate under seal, ten dollars. For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio. For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing. For issuing a writ of error and accompanying papers, five dollars. For a mandate or other process, five dollars. For filing briefs, five dollars for each party appearing. For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

## 25. *Opinions of the Court.*

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the

duty of the clerk to cause the same to be forthwith recorded and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

### *26. Call and Order of the Docket.*

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand in the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the attorney-general.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up

the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

[As amended October term, 1888, 130 U. S. 706.]

### *27. Adjournment.*

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

### *28. Dismissing Cases in Vacation.*

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

### *29. Supersedeas.*

*Supersedeas* bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

### *30. Rehearing.*

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

### *31. Form of Printed Records and Briefs.*

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

[As amended May 14, 1900, 178 U. S. 618.]

### *32. Appeals Under the Act of February 25, 1889, Chapter 236, and of the Act of March 3, 1891, Chapter 517.*

Cases brought to this court by writ of error or appeal under the act of February 25, 1889, Chapter 236, or under Section 5 of the act of March 3, 1891, Chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals.

[As amended November 28, 1892, 146 U. S. 707.]

### *33. Models, Diagrams, and Exhibits of Material.*

1. Models, diagrams, and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

### *34. Custody of Prisoners on Habeas Corpus.*

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

[Promulgated March 29, 1886; and amended May 10, 1886, 117 U. S. 706.]

### 35. *Assignment of Errors.*

1. Where an appeal or writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 8, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of error shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of error shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of error shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9 of Rule 10.

[Promulgated May 11, 1891, 189 U. S. 705.]

### 36. *Appeals and Writs of Error.*

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 8, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

[Promulgated May 11, 1891, 189 U. S. 706.]

### 37. *Cases from Circuit Court of Appeals.*

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.



2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

[Promulgated May 11, 1891, 139 U. S. 706.]

### *38. Interest, Costs, and Fees.*

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

[Promulgated May 11, 1891, 139 U. S. 707.]

### *39. Mandate.*

Mandate shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

[Promulgated November 25, 1895, 159 U. S. 709.]

# VI.

## RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

Compiled by FRANK R. KIMBLEY, of the New York Bar.

The following are the rules of the United States Circuit Courts of Appeals, adopted in each of the nine circuits. The rules are substantially identical in all the circuits, the points of difference being indicated by foot-notes.

### 1. *Name.*

The court adopts "United States Circuit Court of Appeals for the ——" <sup>1</sup>  
Circuit" as the title of the court. <sup>2</sup>

### 2. *Seal.*

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "——" <sup>3</sup>  
Circuit" in two lines, in the center, with a dash beneath.

### 3. *Terms.* <sup>4</sup>

One term of this court shall be held annually at the city of —, <sup>5</sup> and shall be adjourned to such times and places as the court may from time to time designate.

<sup>1</sup> *First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth, respectively.*

<sup>2</sup> In the *Seventh Circuit* this rule reads as follows: "The title of the court shall be 'United States Circuit Court of Appeals for the *Seventh Circuit*.'" See 91 Fed. R. III.

<sup>3</sup> *First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth, respectively.*

<sup>4</sup> This rule reads as follows in the *First Circuit*: "One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon of the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session." In the *Third Circuit*: "The terms of this court shall commence and be held on the first Tuesday in March and the third Tuesday in September, at the city of Philadelphia." In the *Fourth Circuit*: "There shall be held in the city of Richmond, Virginia, three regular terms of this court, one on the first Tuesday

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<sup>5</sup> In the *Second Circuit*, "at the city of New York on the last Tuesday of October." In the *Fifth Circuit*, "at the city of New Orleans on the third Monday of November." In the *Eighth Circuit*, "at the city of St. Louis, Missouri, on the first Monday in December; and one term of this court shall be held annually at the city of St. Paul, Minnesota, on the first Monday of May; and such terms of said court may be adjourned to such times as the court may from time to time designate." In the *Ninth Circuit*, "at the city of San Francisco on the first Monday of October."

#### 4. Quorum.

1. If at any term a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum or may adjourn without day.<sup>1</sup>

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year." In the *Sixth Circuit*: "One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year, except August and September. All sessions of the court shall be held at Cincinnati, unless otherwise especially ordered by the court. At the October, February and May sessions of the court, hereafter referred to as calendar sessions, there shall be a regular and peremptory call of a calendar containing all the cases upon the docket which under the rules should then be ready for hearing. At other than calendar sessions, except the June and July sessions, the court will hear any case upon the docket in which the record has been printed and the briefs for both parties filed, provided that there has been also filed in the clerk's office on the Monday preceding the first day of such session the written consent of counsel for both parties that such hearing may be had. At other than calendar sessions, the court, on motion, will also hear appeals from interlocutory orders granting or refusing preliminary injunctions, appeals, or writs of error in any cause given priority by the statutes of the United States, and appeals from orders in *habeas corpus* proceedings, where the petitioner is in jail, provided that the record has been printed and the brief of the moving party and due notice of the motion have been filed with opposing counsel at least six days before the opening day of the session. Appeals in *habeas corpus* or criminal cases, when the petitioner or appellant is in jail, will be heard at any time when the court is in session after the record has been printed and the brief for the petitioner has been filed with opposing counsel six days before the day set for the hearing of the motion. At other than calendar sessions, the court will also hear all motions and miscellaneous business, and will announce opinions. For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, whether calendar or otherwise, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motions for the advancement of causes will be heard only by the court upon five days' previous notice to opposing counsel." In the *Seventh Circuit*: "A term of this court shall be held annually, at the city of Chicago, on the first Monday in October, and continue until the first Monday in October of the succeeding year. Every term shall be adjourned to such times and places as the court may from time to time designate, unless otherwise specially ordered. The court will hold three sessions for the hearing of causes during each term, beginning on the first Monday in October, the first Monday in January, and the first Monday in May, respectively."

<sup>1</sup> In the *First Circuit*, the clause one of this rule reads as follows: "In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in Rule 8, enter orders directing an adjournment, or adjournments, for longer periods than from day to day, or *sine die*." In the *Seventh Circuit* clause one reads: "If, at any term or session, etc. . . . If, during a term or session, etc.;" and in the *Ninth Circuit*: "If, at any term or session, etc."

### 5. Clerk.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.<sup>1</sup>

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed,<sup>2</sup> and with sureties to be approved, by the court, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.<sup>3</sup>

### 6. Marshal, Crier, and Other Officers.<sup>4</sup>

1. Every marshal and deputy-marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed,<sup>5</sup> and with sureties to be approved, by the court, for the faithful performance of said duties by

<sup>1</sup> In the *Fifth Circuit*, subdivision 1 of rule 5 reads: "The clerk's office shall be kept at the city of New Orleans;" in the *Seventh Circuit*: "The clerk's office shall be kept at Chicago;" in the *Ninth Circuit*: "The clerk's office shall be kept at San Francisco, California."

<sup>2</sup> In the *Fifth Circuit*, "in the sum of ten thousand dollars (\$10,000)."

<sup>3</sup> In the *Seventh Circuit* the following is added to this rule: "5. All fees collected by the clerk, which are not properly taxable as costs in any case and which are not by law required to be by him deposited in the treasury of the United States, shall constitute a fund to be expended by the clerk under the direction of the court in the purchase of law books for the library of the court. 6. The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk, and separately from all individual accounts, in a national bank designated by the senior judge; and at the end of each month and whenever required by the court or senior judge shall submit to the senior judge a detailed report showing by items all moneys received and all paid out during the month and the total balances on hand from each and all sources of receipt. Each report shall be accompanied by a statement over the signature of the cashier or other officer of the bank in which the deposit is kept of the amount in the bank to the credit of the clerk at the close of the last day included in the report." 91 Fed. R. iv.

<sup>4</sup> In the *First Circuit* this rule was amended so as to read: "The marshal shall be in attendance during the sessions of the court, with such number of bailiffs, messengers, and other officers as the court may from time to time order." In the *Sixth Circuit* the first subdivision reads: "The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by section 782 of the Revised Statutes;" in the *Seventh Circuit*: "The crier and bailiffs of the court, before entering upon their duties, shall take an oath in the form prescribed by section 782 of the Revised Statutes;" in the *Eighth and Ninth Circuits* the first subdivision is omitted. 90 Fed. R. lli-cxxxv.

<sup>5</sup> In the *Fifth Circuit* the sum is fixed at \$10,000. 60 Fed. R. lxxxiv.

himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

### 7. *Attorneys and Counsellors.*<sup>1</sup>

All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors in this court on taking an oath or

<sup>1</sup> In the *Fifth Circuit* this rule reads as follows: "All attorneys and counsellors admitted to practice in the Supreme Court of the United States upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz.: "I, — —, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court uprightly and according to law, and that I will support the Constitution of the United States" (a copy of which shall also be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellor eligible to admission as any attorney and counsellor of this court may be admitted to practice, on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll. No fees shall be charged by the clerk under this rule." 90 Fed. R. xcvi. In the *Sixth District*: "All attorneys and counsellors permitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation as prescribed by Rule 2 of the Supreme Court of the United States and upon subscribing the roll. The fee for admission shall be ten dollars. Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk." 96 Fed. R. iv. In the *Seventh Circuit*: "All attorneys and counsellors, admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, or in the Supreme Court of a State in this circuit, may become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States (8 Sup. Ct. v), and on subscribing the roll." 91 Fed. R. v. In the *Eighth Circuit* this rule read as follows: "1. All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, or in the Supreme Court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor." 2. And any attorney and counsellor admitted to practice in the courts of highest original jurisdiction in the States and Territories of this circuit, or in the Supreme Courts of such States and Territories, or in the District or Circuit Courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counsellor of this court upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts, and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the Circuit Court of Appeals for the Eighth Circuit, uprightly and according to law, and that I will support the Constitution of the United States, so help me God." 91 Fed. R. cxxiv. In the *Ninth Circuit*, Rule 7 reads as follows: "All attorneys admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the Ninth Circuit, shall be deemed attorneys of the Circuit Court of Appeals for the Ninth Circuit; but such attorneys, on or before their first appearance in open court in said court, shall take an oath or affirmation, in the form prescribed by Rule 2 of the Supreme Court of the United States, and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court upon taking the oath so prescribed and subscribing the roll of attorneys."

affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.<sup>1</sup>

### 8. *Practice.*<sup>2</sup>

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

### 9. *Process.*

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

### 10. *Bill of Exceptions.*

The judges of the Circuit and District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

### 11. *Assignment of Errors.*

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

### 12. *Objections to Evidence in the Record.*

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation, found in the record as evidence,

<sup>1</sup> In the *Third Circuit* the following clause is added to the rule: "And all attorneys and counsellors of the Circuit Court of the United States for the Third Circuit shall be attorneys and counsellors of this court without taking any further oath." In the *Fourth Circuit* these words are added: "And on payment of a fee of five dollars."

<sup>2</sup> In the *Seventh Circuit* this rule reads as follows: "The practice, so far as may be, shall be the same as in the Supreme Court of the United States."



unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

### *13. Supersedeas and Cost Bonds.*

1. *Supersedeas* bonds in the Circuit and District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or containing an injunction in a Circuit or District Court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such Circuit or District Court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.<sup>1</sup>

### *14. Writs of Error, Appeals, Return, and Record.*<sup>1</sup>

1. The clerk of the court to which any writ of error may be directed<sup>2</sup> shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.<sup>3</sup>

<sup>1</sup> In the *First Circuit* the second subdivision of this rule reads as follows: "On an appeal from an interlocutory order or decree granting, continuing, refusing or dissolving an injunction, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal."

<sup>1</sup> In the *First Circuit* the following additions were made to this rule: *First*. To the sixth paragraph of Rule 14 is added: "The testimony in such record shall embrace the *vera voce* proof in the District Court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable cost of so reducing the same to writing may be taxed as a part of the cost of the record, except so far as allowed as costs in the dis-

<sup>2</sup> In the *Third Circuit*, after the word "directed," the following words are inserted: "Upon being paid or tendered his fees therefor."

<sup>3</sup> In the *Seventh Circuit*: "1. The clerk of the court, to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case necessary to the hearing in this court, under his hand and the seal of the court. The clerk may require of the appellant or plaintiff in error a written precept stating in detail what the transcript shall contain, and when a precept is filed shall insert a copy thereof in the transcript." In the *Ninth Circuit*, after the word "record," added: "opinion or opinions of the court."

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.<sup>4</sup>

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.<sup>5</sup>

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit or District Court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term-time, and be served before the return-day.<sup>6</sup>

trict court." *Second.* New paragraphs are added to Rule 14 as follows: "7. Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort. 8. Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by an examiner appointed by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in Rule 44 of the Circuit Courts of this circuit, *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard as provided in paragraph 2 of Rule 17, nor thereafterwards until the cause has been postponed to the next term or session. 9. Objections to further proof shall be filed with the magistrate and returned with the evidence. Within seven days after the evidence is taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine, and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof. 10. Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed." 90 Fed. R., III.

<sup>4</sup> In the *Eighth Circuit* added to subdivision 2 the words: "and in cases at law a complete copy of the charge of the court to the jury." In the *Ninth Circuit*, after the word "record," the subdivision reads as follows: "The original writ of error and citation, or citation issued in the cause, and certificate under seal stating the cost of the record and by whom paid."

<sup>5</sup> In the *Seventh Circuit* the subdivision 3 reads as follows: "No case shall be heard until a complete record shall have been filed, containing in itself, and not by reference, all papers exhibits, and depositions, and other proceedings necessary to the hearing in this court."

<sup>6</sup> In the *Fifth Circuit* to the fifth subdivision these words are added: "Provided, however,

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

### 15. *Translations.*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

### 16. *Docketing Cases.*<sup>1</sup>

1. It shall be the duty of the plaintiff in error or appellant to docket the case, and file the record thereof with the clerk of this court, by or before the return-day, whether in vacation or in term-time.<sup>2</sup> But, for good cause

that appeals taken from interlocutory decrees under the seventh section of the act entitled 'An act to establish Circuit Courts of Appeals, and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, as said seventh section is amended by an act approved February 18, 1895, shall be made returnable not exceeding ten days from the day of taking the same." In the *Seventh Circuit* this subdivision reads as follows: "All appeals, writs of errors and citations must be made returnable not exceeding thirty days from the date on which the appeal is allowed, or the writ of error issued, whether the return fall in vacation or in term time, and be served before the return day. If a party be non-resident, the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such parties' counsel or attorney of record, who for such purposes may not be discharged unless another resident be designated of record in the case upon whom service may be made." In the *Eighth Circuit*: "All appeals, writs of error, and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day."

<sup>1</sup> In the *First Circuit* this rule reads as follows: "1. The plaintiff in error or appellant shall docket the case, and file the record thereof, on or before the return day, whether in vacation or term time. But for good cause shown, the justice or judge who signed the citation, or any circuit or district judge, may enlarge the time, the order of enlargement to be filed in this court. 2. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, whether in term time or vacation, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and the writ of error or appeal was duly sued out or allowed. And the plaintiff in error or appellant shall not be entitled to docket the case or file the record, after the same shall have been docketed and dismissed under this rule, unless by order of the court after notice to the adverse party. But the defendant in error or appellee may, at his option, docket the case and file the record; and if the case is docketed and the record filed by the plaintiff in error or appellant within the time prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument. 3. On the filing of the record, the appearance of the counsel for the party docketing the case shall be entered."

<sup>2</sup> In the *Sixth Circuit* the following words are inserted after "term-time: " "and at the time of filing the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs, except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed in *forma pauperis*." 96 Fed. R. iv.

shown, the justice or judge who signed the citation,<sup>3</sup> or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term-time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.<sup>4</sup>

### 17. *Docket.*<sup>1</sup>

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither

<sup>3</sup> In the *Fifth Circuit* the words, "The justice or judge who signed the citation," are stricken out.

<sup>4</sup> In the *Fifth Circuit* the following paragraph is added: "4. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf."

<sup>1</sup> In the *First Circuit* this rule reads as follows: "1. The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order. 2. He shall print at least twenty days before the first Tuesdays of October, January and April respectively, a calendar of all the pending cases, arranged by districts in the following order: Maine, New Hampshire, Rhode Island, Massachusetts." In the *Third Circuit* the following is added: "In making up the docket for argument for the term, cases continued at former terms, and all remnants, shall be placed at the head of the argument list in the order with respect to each other in which they stood on the docket at the last preceding term." 100 Fed. R. iii. In the *Sixth Circuit*, after "shall be called at," in the first sentence, the rule reads: "Every calendar session, as provided in Rules 8 and 37," and instead of "terms" the words "calendar sessions" are used. In the *Seventh Circuit* this rule reads: "The clerks shall prepare calendars for causes for the regular terms of this court, to be held on the first Monday of October in each year, and calendars for each adjourned term of the court, placing thereon in proper chronological order only causes in which the record shall have been printed fully thirty days before such term, or such adjourned term, and those causes in which the record having been printed, briefs upon both sides have been filed seven days before the beginning of such term, or adjourned term." In the *Ninth Circuit* as follows: "The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars in each case, enter upon a docket all cases brought to and pending in the court in their proper chronological order."

party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

### 18. *Certiorari.*

No *certiorari* for diminution of the record will be hereafter<sup>1</sup> awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all<sup>2</sup> motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

### 19. *Death of a Party.*

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a Circuit or District Court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the Circuit or District Court, and, at the time of suing out such writ of error or appeal, the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases; and, within thirty days after the filing of the record in

<sup>1</sup> In the *Eighth Circuit*, the word "hereafter" is omitted.

<sup>2</sup> In the *Seventh Circuit*, the word "any" is used in place of "all."

this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or district in which such representative resides; and, upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

## *20. Dismissing Cases.<sup>1</sup>*

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

## *21. Motions.<sup>1</sup>*

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.<sup>2</sup>

<sup>1</sup> In the *Seventh Circuit* this rule reads as follows: "Whenever the parties to a writ of error or an appeal shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, in respect to costs, and shall pay to the clerk any fees that may be due to him, the clerk shall enter the case dismissed, and shall give to either party requesting it a copy of the agreement filed, but no mandate or other process shall issue without an order of the court."

<sup>1</sup> In the *First Circuit* this rule reads as follows: "1. The motion-day shall be the first Tues-

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<sup>2</sup> In the *Ninth Circuit* the following words are added to subdivision 1: "and shall be served upon opposing counsel at least five days before the day noticed for the hearing."



2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.<sup>2</sup>

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

## *22. Parties not Ready.<sup>1</sup>*

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called, and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

day of every stated session of the court, and any other Tuesday while the court shall remain in session. 2. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion. 3. All motions to dismiss writs of error or appeals (except motions to docket and dismiss under Rule 16), or to advance cases, or for a writ of *certiorari*, and other special motions, shall be printed, and be accompanied by printed briefs. 4. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel. 5. Any motion of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court. 6. Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins."

<sup>2</sup> In the *Seventh* and *Ninth Circuits* one-half hour is allowed on each side for argument.

<sup>1</sup> In the *First Circuit* the following paragraph was added before subdivision 1: "On the first Tuesdays of October, January, and April the court, except as may, from time to time, be otherwise ordered, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the session in the same order, but no case from the district of Massachusetts shall be called before the second Tuesday of the session;" and after subdivision 3 the following: "5. If either of the parties is ready when the case is called, the same may be heard; and, if neither party is ready, the case may be dismissed or be postponed to the next session, as the court may order. 6. If a case is called for hearing at two stated sessions successively, and on the call at the second session neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement." In the *Sixth Circuit* the following was added after subdivision 3: "4. All causes shall stand for hearing when the time allowed for printing the records and briefs of both parties shall have expired; provided, however, that causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired." In the *Seventh Circuit* the words "the plaintiff called, and" are omitted from the first subdivision. The second subdivision reads: "2. If the appellee or defendant in error fails to appear when the case is called, the court may proceed to hear argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case;" in the subdivision 3, after the word "party," these words are inserted: "and no brief on file for the appellant or plaintiff in error;" and after "cost" these words: "of the appellant or plaintiff in error." 91 Fed. R. x. In the *Eighth Circuit* the words "in error or appellant" are inserted after "plaintiff" in the third line of the first paragraph, fourth line of the second paragraph, and last line of the third paragraph. In the *Ninth Circuit* the first word in the second paragraph is "when" instead of "where;" the first word in the third paragraph is "where" instead of "when;" and "in error or appellant" is added after "plaintiff" in the last line of paragraph 3.

8. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

### 23. *Printing Records.*<sup>1</sup>

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such

<sup>1</sup> In the *First Circuit* this rule reads as follows: "1. In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf. 2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed. 3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk's supervision, for the use of the court and of counsel. 4. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed. 5. The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court. 6. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. 7. The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing. 8. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel. 9. In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process." In the *Second Circuit* this rule reads as follows: "On the filing of the transcript, in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given." In the *Third Circuit* as follows: "1. On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file fourteen copies thereof in his office. The parties may stipulate, in writing, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error, or appellant, the cost of printing the record before ordering the

printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party at least six days before the argument. The parties may stipulate in writing

same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket, because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given. 2. The clerk shall receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing;" and the following order was made: "March 18, 1895. Ordered that, except upon special allowance by the court or a judge, no cause shall be placed on the docket for argument unless the transcript shall have been filed with the clerk, under Rule 23, at least ten days before the first day of the term." In the *Fourth Circuit* as follows: "1. Hereafter all records shall be printed under supervision of the clerk, by such printer and at such rate as the court may designate. 2. Upon the payment of the estimated cost of printing, together with the supervising fees as established by law (which amounts shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty copies of the record, twenty copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies delivered to the appellant or plaintiff in error at least ten days before the term or adjourned term. 3. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. 4. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. 5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same, shall be taxed against the party against whom costs are given." (See additional notes at the end of these rules.) In the *Fifth Circuit*: "1. The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing on the regular call of the docket, the case shall be dismissed. 2. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may by written stipulation filed prior to the printing of the record agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record. 3. The clerk shall not take to the printer the original transcript or file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed. 4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies. 5. The clerk shall supervise the printing and see that the printed record is properly indexed. He shall distribute the printed copies to the judges of the court and to the reporter from time to time, as is required. If the cost for printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof. 6. In case of reversal, affirmance, or dismissal with costs, the amount of the costs of the printing of the record and of the clerk's fees for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process. 7. The clerk shall receive from either party, and use as

that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dis-

parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the costs of printing." In the *Sixth Circuit*: "1. The clerk shall supervise the printing of all records, and, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record, and his fee for preparing it for the printer, and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error or appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion. 2. After the payment to him of such estimate the clerk shall cause at least twenty-five copies of the record to be printed forthwith, shall file the same and furnish to each of the respective parties three copies thereof, and take a receipt therefor. 3. Parties may agree, by written stipulation filed with or prior to the filing of the record, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The plaintiff in error or appellant may, within ten days after the case shall be docketed in this court, file with the clerk a statement of the parts of the record he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within fifteen days after service of such statement, may designate in writing, filed with the clerk, additional of the record which he thinks material, and if he shall not so do he shall be held to have consented to the hearing of the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which the court shall think proper. If good cause be shown, the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session or by either circuit judge if eligible to sit in the cause. 4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof. 5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process. 6. In any case where the record shall have been printed in the court below, either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require as a condition of making the order, a certificate of the clerk of this court that the record is in accordance with the printing rules and is properly indexed, in which case the supervision fee provided in table of costs, Rule 31, shall be charged and collected by the clerk (96 Fed. R. v). 7. The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge, who may, in his discretion, award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded; and, when a case shall be heard upon a record printed in a court below, the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree."

In the *Seventh Circuit*: 1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk with surety, to be approved by the clerk, for the payment of all costs which shall be incurred in the cause, shall deposit twenty-five dollars to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

missed. In case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

2. The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record, and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error or appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion. 3. The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor; and the parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case may be heard only on the parts so printed, but the court may direct the printing of other parts of the record. 4. The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies. 5. The clerk shall supervise the printing, and see that the printed record is properly indexed. He shall distribute the printed copies to the justices of the court from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record, or any copies thereof. 6. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process. 7. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties, respectively, to compel the payment of said fees. 8. The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or a memorandum the time when each pleading or document was filed, and the printed record shall also contain running titles of its contents. 9. The briefs of attorneys shall also be printed, and conform as nearly as practicable to the size of the printed record. 10. The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record and of each brief, printed motion, and argument submitted therein. 11. In any case where the record shall have been printed in the court below, the presiding judge may, on the application of the plaintiff in error or appellant, order that such printed record, if properly indexed, may be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to such record an index, and shall be paid the same fees for the indexing and supervision thereof as if printed under his supervision. 12. The clerk of this court shall advertise for proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies, when printing may be done by another at the same or less price; and, when a case shall be heard upon the record printed in the court below, the costs for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree." 13. The fees of the clerk of this court shall be those prescribed by the Supreme Court February 28, 1898. See 91 Fed. R. xi.

In the *Eighth Circuit*, subdivision 1 is substantially the same as paragraphs 2, 3, 4 and 5 of subdivision 3 of rule in the *Sixth Circuit*, *supra*, except that the time for filing the statements by the appellant or appellee is twenty days. The rest of the rule reads as follows: "2. On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least thirty days before the argument. 3. The clerk shall be en-



### 24. Briefs.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six<sup>1</sup> days before the case is called for argument, twenty<sup>2</sup> copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated: —

(1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(2)<sup>3</sup> A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem*

titled to demand of the appellant or plaintiff in error the cost of printing before ordering the same to be done. 4. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the cost of printing, the case may be dismissed. 5. In case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given." In the *Ninth Circuit*: "1. Hereafter all records shall be printed under the supervision of the clerk, and upon the docketing of a cause he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed. 2. Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed, under his supervision, for the use of the court and of counsel. 3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction." Subdivisions 4, 5 and 6 are substantially the same as subdivisions 5 and 6 of the rule of the *Seventh Circuit*, *supra*. Subdivision 7 reads as follows: "The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter may designate in writing, filed with the clerk, additional parts of the record which he thinks material, etc.," like subdivision 8 of the rule of the *Sixth Circuit*, *supra*. "All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as documents to be printed or omitted. 8. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient sizes, shall be used in printing the record." 99 Fed. R. iii. "9. The fee of the clerk for preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index, twenty-five cents."

<sup>1</sup> In the *Second Circuit*, twenty days. In the *Fourth Circuit*, ten days before the term. In the *Sixth Circuit*, "within twenty-five days after the filing of the printed copies of the record as required in Rule 23 as amended." In the *Seventh Circuit*, "within twenty days after the date of the delivery by the clerk of the printed record." In the *Eighth Circuit*, twenty days. In the *Ninth Circuit*, ten days.

<sup>2</sup> In the *Second Circuit*, ten copies.

<sup>3</sup> This subdivision omitted in the *Sixth Circuit*.



*verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty<sup>4</sup> printed copies of his brief at least three<sup>5</sup> days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court, and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.<sup>6</sup>

## *25. Oral Arguments.*

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case; but when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

<sup>4</sup> In the *Second Circuit*, ten copies.

<sup>5</sup> In the *Second Circuit*, ten days. In the *Fourth Circuit*, three days before the term or adjourned term. In the *Sixth Circuit*, "within forty days after the filing of the printed record as required by Rule 23." In the *Seventh Circuit*, "within twenty days after the filing of the brief of the plaintiff in error or appellant."

<sup>6</sup> In the *Seventh Circuit*, subdivision 2 reads as follows: "This brief shall contain, in the order stated, and under the respective titles, 'Statement of Case,' 'Errors Relied Upon,' and 'Brief of Argument.'" To subdivision 3 is added: "Either party, at or before argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party." In subdivision 4 after "rule" is inserted, "and Rule 11, *ante*;" and after "notice a plain error," the rule reads, "involving the merits of the case, though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below."

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.<sup>1</sup>

## 26. *Form of Printed Records, Arguments, and Briefs.*<sup>1</sup>

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume.

<sup>1</sup> In the *Second Circuit* the following words are added to subdivision 3 before "two hours," viz.: "Upon writs of error, appeals in customs cases, and appeals from orders granting or refusing a preliminary injunction, one hour on each side, and in other cases." In the *Fifth Circuit* subdivision 3 reads as follows: "3. One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court." In the *Seventh Circuit* these words are added to this rule: "4. Reading at length from briefs or reported cases shall not be indulged in." In the *Ninth Circuit*, one hour is allowed on each side for argument.

<sup>1</sup> In the *Second Circuit* this rule reads: "All arguments and briefs printed for the use of the court must be printed upon a page eleven inches long by seven inches wide, and must have a margin of at least two inches in width." 98 Fed. R. III. In the *Fourth Circuit*: "All records, arguments, and briefs printed for the use of this court shall be in small pica type, twenty-four pica ems to a line, with an index, and a suitable cover, containing the title of the court and cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be 9¼ x 6¼ inches, except that in patent cases the size of the pages shall be 10¾ x 7¾ inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding. So much of the record as was printed in the court below may be used in this court if it conforms to this rule." In the *Fifth Circuit* the word "record" in the first line is omitted. In the *Sixth Circuit* the rule reads as follows: "1. All records shall be of a uniform size, printed in small pica type, twenty-four pica ems to a line, forty-eight lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case: size of pages to be 9¼ x 6¼ inches, except that in patent cases the size of the pages shall be 10¾ x 7¾ inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding. 2. All arguments and briefs of attorneys shall be printed, and conform as near as practicable to the size of the printed record." In the *Seventh Circuit* this rule was repealed by the adoption of Rule 85, and Rule 28 was amended by changing it from 28 to 26 (see Rule 28, *infra*). In the *Ninth Circuit* this rule reads as follows: "1. All records printed for the use of the court must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk, at the time of docketing the cause, patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double leaded is the only mode of composition allowed. 2. All arguments, briefs and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of a marginal note, reference, or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed."

### *27. Copies of Records and Briefs.<sup>1</sup>*

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

### *28. Opinions of the Court.*

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.<sup>1</sup>

2. The original opinions of the court shall be filed with the clerk of this court for preservation.<sup>2</sup>

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded, within the meaning of this rule.<sup>3</sup>

### *29. Rehearing.<sup>4</sup>*

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term, and must be printed, and briefly and distinctly state its grounds,

<sup>1</sup> In the *Seventh Circuit* this rule was repealed by Rule 35, and the number of Rule 29 was changed to 27. (See Rule 29.)

<sup>2</sup> In the *Third Circuit*, subdivision 1 reads as follows: "1. All written opinions delivered by the court shall be delivered to the clerk and recorded." In the *Fourth Circuit* this first subdivision reads: "1. All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases to be taxed and allowed as other costs."

<sup>3</sup> Subdivision 2 omitted in *Third Circuit*. In the *Sixth Circuit* this subdivision reads: "The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded in accordance with paragraph 7, Rule 23."

<sup>4</sup> In the *Fourth Circuit* the subdivision 3 reads: "3. The clerk of this court shall, from time to time, cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk's office and one set to be kept in the court library." In the *Sixth Circuit* the first clause of this subdivision reads: "Opinions printed under the supervision of the clerk need not be copied into a book of records." Paragraph 4 was repealed by the order of the Supreme Court establishing a table of fees for the Circuit Courts of Appeal. 90 Fed. R. cixxi. In the *Seventh Circuit* this rule is number 26. In the *Ninth Circuit* this entire rule reads: "The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed they shall be deemed to have been recorded within the meaning of this rule."

<sup>4</sup> In the *First Circuit* this rule reads: "A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entering, and not later, unless by leave granted during the term. It must be in print, in the form and style required by Rule 26, and it must briefly and distinctly state its grounds and be supported by a certificate of counsel. It will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines. Provided, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment." In the *Fifth Circuit* insert after "entered," "and within twenty days after such entry," and after "grounds," insert: "without argument." In the *Sixth Circuit* this rule reads: "A

and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

### 30. *Interest.*

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State<sup>1</sup> or Territory where such judgment was rendered.<sup>2</sup>

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

### 31. *Costs.*<sup>3</sup>

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction,<sup>4</sup> costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.<sup>5</sup>

3. In cases of reversal of any judgment or decree in this court, costs shall

petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket)," and then like the original rule. In the *Seventh Circuit* this rule is numbered 27, and reads as follows: "A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who within twenty days from such service may file a printed answer, and the petition shall be determined without oral argument, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue the mandate of the court to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court."

<sup>1</sup> In the *Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits*, the words "or Territory" follow the word "State."

<sup>2</sup> In the *Seventh Circuit* the first clause of subdivision 1 reads as follows: "1. When a judgment for the payment of money is affirmed by this court," and this rule is numbered 28.

<sup>3</sup> See in connection with this rule the table of fees established by the Supreme Court for the Circuit Court of Appeals January 10, 1893, 90 Fed. R. clxxi.

<sup>4</sup> In the *Eighth Circuit*, the clause, "except where the dismissal is for want of jurisdiction," is omitted. In the *Seventh Circuit* this first clause reads: "1. When any suit shall be dismissed in this court, except for want of jurisdiction," and the number of this rule is 29.

<sup>5</sup> This subdivision in the *Seventh Circuit* begins, "In every case of a judgment or decree affirmed."

be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.<sup>6</sup>

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.<sup>7</sup>

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.<sup>8</sup>

### 32. *Mandate.*<sup>9</sup>

In all cases finally determined in this court, a mandate, or other proper process in the nature of a *procedendo*, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

<sup>6</sup> In the *Eighth Circuit* the last sentence of this subdivision is omitted. In the *Seventh Circuit* this subdivision begins: "In every case of reversal of," etc.

<sup>7</sup> In the *Seventh Circuit* this subdivision reads: "4. No costs shall be allowed in this court for or against the United States."

<sup>8</sup> In the *Ninth Circuit* this is added to the rule: "7. Upon the clerk's producing satisfactory evidence by affidavit or the acknowledgment of the parties or their sureties of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively to compel payment of said fees."

<sup>9</sup> In the *First Circuit* this rule reads: "In every case finally determined, a mandate, or other proper process in the nature of a *procedendo*, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below as to law and justice may appertain. Such mandate, or other process, may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of judgment, unless a petition for a rehearing has been filed and remains undisposed of. In the *Fifth Circuit* as follows: "Mandates may issue in all cases finally disposed of by this court on application of either of the parties at any time after twenty-one days from the date of decision, unless the court or one of the judges shall, in the meantime, grant leave to file a petition for hearing (adopted February 28, 1894); provided that in all cases entitled to precedence in this court under section 7 of the act approved March 3, 1891, the mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the rendition of the decree of this court, unless otherwise ordered by the court or one of the judges thereof (adopted January 16, 1893)." In the *Sixth Circuit* the following is added to this rule: "Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by Rule 29; and no mandate or other process of *procedendo* shall issue when a petition to rehear is pending, unless specially ordered. Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case." In the *Seventh Circuit* this rule is number 30. In the *Ninth Circuit* this rule reads as follows: "In all cases finally determined in this court, a mandate or other process in the nature of a *procedendo*, at the request of counsel for the prevailing party and upon payment of any costs due in the case, shall be issued as of course from this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may

### 33. *Custody of Prisoners on Habeas Corpus.*<sup>1</sup>

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

### 34. *Models, Diagrams, and Exhibits of Material.*<sup>2</sup>

1. Models, diagrams, and exhibits of material, forming part of the evidence taken in the court below, in any case pending in this court, on writ

appertain. Such mandate, if not stayed by the order of the court, shall be issued on the expiration of fifteen days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall not issue until after the determination of such petition."

<sup>1</sup> In the *Seventh Circuit* this rule is numbered 31.

<sup>2</sup> In the *Seventh Circuit* this rule is numbered 32.

In the *First Circuit* there is this additional rule: "*Error in criminal cases.*— On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment, or any judge thereof, shall have power to admit to bail the plaintiff in error, according to the rules of law applicable to his case." 90 Fed. R. ix.

#### ADDITIONAL RULES.

*First Circuit, Bankruptcy.*— "1. On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or under any acts which may hereafter be passed in addition thereto, or amendatory thereof, the clerk shall issue, as of course, an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in a District Court, at least one week before the return-day of the order, which service shall be made by marshal or his deputy in the district where the party or solicitors served resides. 2. Within one calendar month after the return-day of the order to show cause, either party may demur, plead or answer, but the determination of any demurrer, plea or answer, shall be final, and no order to plead over will be allowed; and any party may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein. 3. There shall be no pleading in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise. 4. A motion to dismiss may be filed within the time allowed for a demurrer, plea or answer, or the subject-matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea or answer, by proper allegations; and whenever a motion is seasonably filed, the time for filing demurrer, plea or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the cir-



of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

cuit judges, and to the district judge, senior in commission who is not disqualified. Thereupon the motion will be disposed of by the court on the briefs, unless, at its own suggestion, or for good cause shown, the court shall order oral arguments. 5. So much of Rule 14 as relates to *viva voce* proofs, in the District Courts, or to further proof in instance causes in admiralty, shall apply to appeals and petitions authorized by the act aforesaid, or by acts hereafter passed additional thereto or amendatory thereof: provided, any record on any such appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk. 6. The rules with reference to records, printing and briefs, and all other rules, except as herein modified, shall apply to the proceedings to which this order relates. 7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceedings or to prevent injustice." 94 Fed. R. III.

In the *Second Circuit* these further amendments:

*Rule 35, adopted May 3, 1897.*—"1. An appeal or writ of error from a Circuit Court or a District Court to this court in the cases provided for in sections 6 and 7 of the act entitled 'An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, approved March 3, 1891, and acts to amend said act approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal. 2. Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed."

*Rule 36, May 18, 1898.*—"In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf. At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys." Petitions to review orders in bankruptcy filed under the provisions of section 24b of the Bankruptcy Act must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively.

. In the *Third Circuit* the following order was made December 7, 1898: "It is ordered that hereafter there shall be but a single court docket and no 'special docket,' and cases shall be placed thereon as follows: I. Those cases on the trial or hearing of which both of the circuit judges shall be competent to sit. II. Those cases on the trial or hearing of which the circuit judge oldest in commission shall be competent to sit. III. Those cases on the trial or hearing of which the circuit judge youngest in commission shall be competent to sit. Under and with respect to each of these three general divisions, there shall be placed first in order upon the docket those cases in which the district judge assigned for the term shall be competent to sit, and immediately thereafter the cases in which he will not be competent to sit. Subject to the foregoing, cases shall be arranged in proper chronological order."

In the *Fourth Circuit* there is this Rule 36: "*Bankruptcy.*—1. Upon the filing of the petition for review as provided for in section 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur or move to dismiss the said petition, within fifteen days from the date of such notice. 2. The petitioner shall cause

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case,

a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition. 3. Upon the filing of such transcript of the record the clerk of this court shall proceed to cause the record to be printed as provided for by the twenty-third rule of this court and furnish the counsel on both sides with three copies each." See *supra*, Rule 23. "4. And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard either in term time or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument. 5. That all causes coming up by appeal as provided in section 25 of said Bankruptcy Act shall stand for hearing in this court, either in term time or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule. 6. All rules of this court (except as herein modified) shall apply to the proceedings in bankruptcy to which this rule relates. 7. Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the time as named herein, or any other order suitable to expedite the proceeding or to prevent injustice."

"The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and that this court will meet on said days for consultation only."

"*Attendance of district judges — Notice.*— It is ordered that the clerk of this court shall, thirty days before the commencement of each term thereof, notify one of the district judges of this circuit, commencing with the oldest in commission, that his presence is desired during said term, as a member of the court: provided, that if the chief justice, or either of the circuit judges, prior to the commencement of any term, advise the clerk of their inability, or the inability of either of them, to attend and remain during the then coming term of court, then the clerk shall, in manner hereinbefore mentioned, notify and request the presence of an additional district judge, to sit in the place of the judge or judges so unable to attend. And the clerk shall continue to so notify and request the presence of the district judges, to attend the terms of this court, in the order of the seniority of their commissions, until each of the district judges of this circuit shall have so participated in the proceedings of the court, and thereafter he shall continue in the same order to so notify and request their presence for the subsequent terms of this court; and provided, also, that if any district judge so notified, informs the clerk of his inability to attend the term at which his presence was requested, then the clerk shall so notify the district judge next in commission, and request his presence. And if during any term of this court, less than a full bench should be present for business, then those so present shall determine which of the district judges of the circuit shall be called to attend and sit with them during the absence of those so constituting the court for said term, if the presence of an additional judge be deemed necessary."

#### METHOD OF TAKING APPEALS.

Writs of error and citations are no longer made returnable to the term day of the appellate court, but are made returnable not exceeding thirty days from the day of signing the citation, whether that day, which is the return-day, fall in vacation or in term time; and the record must be filed in the clerk's office of this court before the return-day, unless the time be enlarged as provided in section 1 of Rule 16. In that case the order of enlargement must be filed with the clerk of this court. Rule 11, entitled "Assignment of Errors," requires the plaintiff in error, or appellant, to file with the court below with his petition for the writ of error or appeal, an assignment of errors, etc. This practically abolishes the necessity of pursuing the old method of praying appeals in "open court;" and all appeals and writs of error should be prayed for by petition in writing addressed to the court below, or to the judge in vacation, who allows the writ or the appeal, by an order in writing, approves the appeal or *supersedes* bond, and signs the citation. In cases brought up by writ of error, from either the Circuit or District Courts, the clerk of the Circuit Court or the clerk of this court issues the writ of error, which writ fixes the return-day of the writ to this court, and the citation should bear the same return-day. But in cases of appeal (in admiralty or in equity) the citation alone fixes the return-day. All appeals, therefore, whether by writ of error or appeal, should hereafter be taken in the following manner: (1) Petition in

must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this

writing for the appeal, or writ of error, addressed to the court below, or the judge thereof in vacation. (2) The petition must be accompanied with an assignment of errors, and a prayer for reversal. (3) Appeal or writ of error bond, approval thereof, and the signing of the citation by the judge allowing the appeal or writ. (4) Order in writing of the judge allowing the writ of error or appeal. (5) Issuing the writ of error by the clerk of the Circuit Court or of this court. (6) In case it is desired to have the writ of error issued by the clerk of this court, a certified copy of the petition and order allowing the writ, under the seal of the court, with a fee of five dollars for issuing it, must be transmitted to the clerk of this court, and the writ will be issued and forwarded to the clerk of the court below. All of the above papers and proceedings should be filed with the clerk of the lower court, and incorporated into and certified up in the record by him to this court, except the writ of error and the citation, the originals of which, after having been duly served, must be attached to and bound in the record at their respective places. (For service of writ of error, see sec. 1007, Revised Statutes.) Rules of this court, blank writs of error, appeal and *supersedeas* bonds, citations, and orders of appearance, may be had of the clerks of the lower courts, or of the clerk of this court, upon application. See for instructions to clerk in making up the record, 90 Fed. R. lxxxvi.

#### DOCKETING CASES AND PRINTING RECORDS.

Upon a record being filed, the case is docketed and put upon the calendar for argument at the next term or adjourned term occurring thereafter, provided the record has been or can be printed twenty days before the said term or adjourned term. Counsel transmitting a record to this court must accompany the same with an order for their appearance for the appellant or plaintiff in error, and also for a deposit of \$25 for account of costs of this court. The clerk of this court will, immediately upon a record being filed, send to the counsel an estimate of the cost of printing, which amount must be deposited within ten days as provided in Rule 28 as amended. A headline at the top of each page, containing the title of the case, should also be printed in the records, so that, when bound in volumes, there shall be not only uniformity in appearance and style, but the eye will be enabled to catch the particular case at once upon opening the volume. It is important that records should be made up and forwarded to this office as promptly as possible after the appeal or writ is allowed, and not held until the near approach of the next term; especially so when the records are to be printed after filing. It will enable the printer to give more time and attention to the printing, and insure the cases being ready and the work more correctly done. No record, when once filed, can be withdrawn for the purpose of having it printed elsewhere."

In the *Fifth Circuit* there are the following additional rules:

"*Rule 35. Order in relation to assignment of cases for hearing.*—Thirty days prior to the opening of the regular session of the court, the clerk is directed to assign cases for hearing during the first month of the term at the rate of two cases per day for the first three days of each week. Any cases entitled by law to preference in hearing shall be first assigned, and thereafter causes shall be grouped by States, and assignments made so as to permit the hearing of causes from one State before the causes from the next State in order shall be called."

"*Rule 36.* It is ordered that, whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit and of the circuit judges, so many of the district judges in the order of seniority of their respective commissions, and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid."

"*Rule 37. Writs of error in criminal cases.*—1. Writs of error to review criminal cases tried in any District or Circuit Court of the United States within this circuit, which may be reviewed under the provisions of the act of March 3, 1891, creating this court, and the act of Congress amendatory thereof, approved January 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, by either of the circuit judges or by any district judge who presided on the trial and the proper security to be taken, and the

rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

citation be signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings pending the determination of such writ of error. 2. Where such writ of error is allowed in any criminal case as aforesaid, the Circuit Court or District Court, before which the accused was tried, or the trial judge or the circuit justice assigned to the circuit, or either of the circuit judges, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules." For the appendix to this rule see 90 Fed. R. xcvi.

In the *Sixth Circuit* there are the following rules:

"*Rule 35. Testimony in admiralty case after appeal.*—In admiralty appeals no testimony shall be taken except under a commission issued from this court to a clerk of a United States court or a United States commissioner, by direction of the court, the circuit justice, or either circuit judge, qualified to sit on appeal in said case, after cause shown to such court, justice or judge, that such evidence is material and necessary, and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only upon interrogatories settled by such court, justice, or judge upon at least ten days' previous notice to the opposing party or his attorney (accompanied with a copy of the proposed interrogatories), and upon cross-interrogatories to be settled at the same time, after five days' previous notice of the same, with copy thereof, to be served upon counsel offering testimony." See also a rule as to disposition of fees and costs, by the clerk, Rule 36, 90 Fed. R. cvii.

"*Rule 37. Call and order of the docket.*—1. The court on the first day of each calendar session will begin calling the cases for argument in the order in which they stand on the docket and proceed from day to day during the session in the same way. If the parties or either of them shall be ready when the case is called, the same will be heard, and if neither party shall be ready to proceed with the argument the case will be continued to the next calendar session. 2. Each day calendar shall consist of six cases next in order after the last case submitted on the previous day, but the calendar will not include any case continued or passed by the court on stipulation of counsel before adjournment of court of the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of the clerk as to the probable time of the hearing of any case, otherwise shown in the day's calendar above provided for, must do so at their own risk. 3. Two or more cases involving the same question may by leave of the court be heard together, but the must be argued as one case.

"*Rule 38.*—An appeal or writ of error from a Circuit Court or District Court to this court in cases provided for in section 6 and 7 of the act entitled 'An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, and acts to amend said act, approved February 18, 1895, and January 20, 1897, may be allowed in term time or vacation by the circuit justice or by either circuit judge within the circuit or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a *supersedeas* and stay of execution or proceedings, pending such writ of error or appeal. 2. When such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal cases in which it will lie, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed." 90 Fed. R. cvii-cviii. See note to this rule, 90 Fed. R. cviii.

In the *Eighth Circuit* there is an additional Rule 35, which is the same as Rule 37 in the *Fifth Circuit*, set out *supra*. See appendix to this rule, 90 Fed. R. cxxxi, for form of bail bond.

In the *Ninth Circuit* there are three additional rules:

"*35. Assignment of causes for hearing.*—1. Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for each Monday and two cases per day for the following four days of each week. Causes shall be grouped by States, and assignments made, so as to permit the hearing of causes from one State before the causes from the next State in order shall be called; causes

## ADMIRALTY RULES OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The following are the rules in Admiralty adopted on July 1, 1892:

### RULE I.

#### APPEALS AND NEW PLEADINGS.

An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of.

If the notice does not so state, the appeal shall be heard on the pleadings and evidence in the District Court, unless the appellate court, on motion, otherwise order.

### RULE II.

#### NOTICE AND BOND.

SECTION 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the District Court a bond for costs of the appeal, with sufficient surety in the sum of \$250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.

SEC. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the District Court or a

from the Northern District of California shall be assigned for hearing last. Any cause entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same State. 2. A stipulation to continue a case to the foot of the calendar, or in any way change the day assigned for hearing, will not be recognized as binding upon the court, and no such change will be made except by order of the court for reason shown. 3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

"Rule 36. *Terms and sessions of the court.*—1. One session of this court shall be held annually on the first Monday of October, and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco unless otherwise especially ordered by the court. 2. The October, February and May sessions shall be known as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35. 3. A term of this court shall be held annually in the city of Seattle in the State of Washington, and in the city of Portland in the State of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the Circuit and District Courts for the district of Washington shall be heard at said annual term in the city of Seattle, unless it is stipulated by the parties thereto that they be heard at San Francisco. Appeals and writs of error from the Circuit and District Courts for the districts of Idaho and Montana may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

"Rule 37. *Certification of printed matter.*—In all cases where printed matter is certified, the fees of the clerk of this court for certifying to such printed matter are hereby fixed at the rate of twenty cents per folio of one hundred words."

judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

SEC. 8. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

### RULE III.

#### REVIEW IN PART ONLY.

The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

### RULE IV.

#### APOSTLES ON APPEAL TO CONTAIN.

SECTION 1. The apostles, on appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and, if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause; and

(7) The final decree, and the notice of appeal.

(8) The assignments of error.

SEC. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.



**SEC. 8.** Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

### **RULE V.**

#### **CERTIFYING RECORDS.**

The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the District Court, or in case of a special appeal, the stipulated record with the certification by the said clerk of all papers contained therein on file in his office.

### **RULE VI.**

#### **IF APPEARANCE OF APPELLEE NOT ENTERED.**

If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed *ex parte* in the cause, and have such decree as the nature of the case may demand.

### **RULE VII.**

#### **NEW ALLEGATIONS, ETC.**

Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles and upon at least four days' notice to the adverse party.

### **RULE VIII.**

#### **NEW PLEADINGS — NEW TESTIMONY.**

If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

### **RULE IX.**

#### **NEW TESTIMONY — HOW TAKEN.**

Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.

**RULE X.**

**PRINTING NEW PLEADINGS AND TESTIMONY.**

If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d General Rule provided.

**RULE XI.**

**MOTIONS.**

All motions shall be made upon at least four days' notice.

**RULE XII.**

**WRIT OF INHIBITION.**

A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below when circumstances require.

**RULE XIII.**

**MANDAMUS.**

A mandamus may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below.

**RULE XIV.**

**CASES TO BE PLACED ON DOCKET.**

Each case shall be placed on the docket as soon as the printing of the apostles is completed by the clerk.

**RULE XV.**

**BRIEFS.**

**SECTION 1.** Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief and shall at the same time serve two copies thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain in the order here stated:

(1) A statement of the nature of the appeal, the court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court or new proofs have been taken, it shall be stated what amendments have been made and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

**SEC. 2.** The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like

character with that required of the appellant, and in case new proofs are taken on behalf of the appellee, the brief shall so state and wherein the new proofs have changed the case as made in the court below.

SEC. 8. The reasonable expense of printing briefs shall be an item of taxable costs.

### **RULE XVI.**

#### **MANDATES.**

The decrees of this court shall direct that a mandate issue to the court below.

### **RULE XVII.**

#### **EXTENSION OF TIME.**

The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.

### **RULE XVIII.**

#### **WHEN RULES OF DISTRICT COURTS TO APPLY.**

In all matters, in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the District Court of the district in which the cause was decided, being in force at the time (not being inconsistent with these rules), will be adopted so far as may seem proper.

### **RULE XIX.**

The following of the general rules of this court, and no others, shall be deemed admiralty rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; section 4 of rule 14; rules 15, 16, 17, 18, 19, 20, 21, 22; amended rule 23; rules 25, 26, 27, 28, 29, section 4 of rule 30; rules 31, 33 and 34.

## VII.

### ORDERS IN REFERENCE TO APPEALS FROM THE COURT OF CLAIMS.

**REGULATIONS PRESCRIBED BY THE SUPREME COURT OF THE UNITED STATES UNDER WHICH APPEALS MAY BE TAKEN FROM THE COURT OF CLAIMS TO SAID SUPREME COURT.**

**I. In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:**

**1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.**

**2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.**

**II. In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.**

**III. In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal.**

**IV. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.**

V. In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

## RULES OF THE COURT OF CLAIMS.

### *Attorneys and Counsel.*

1. Suits may be commenced by the claimant in person, or through his attorney in fact, or an attorney of this court. If the claimant is represented by an attorney in fact, the power must be filed with the clerk, and its execution must be proved or acknowledged before an officer authorized to take acknowledgments of deeds.

2. Any person of good moral character, who has been admitted to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of any State or Territory, may be admitted, on motion in open court, to practice as an attorney and counsellor of this court.

He may also be admitted by an order at chambers, on its being shown by affidavit or otherwise that he is qualified as above provided.

3. There shall be but one attorney of record for the claimant in any case at any one time; but a claimant may be permitted to change his attorney, on such conditions as the court may prescribe. A firm of attorneys will be regarded as the attorney of record.

4. Petitions, pleadings, and motions on the part of the claimant will be signed by the attorney of record; pleadings and motions on the part of the United States, by the Assistant Attorney-General.

5. Attorneys of record, or the claimant if he appear in person, will, on commencing or appearing in a suit, register with the clerk of the court a post-office address, to which all notices required by these rules or ordered by the court may be addressed.

6. Counsel, other than the attorney of record, may be heard on either side at the trial or in any stage of the proceedings, but shall not be entitled to file pleadings, give notices, or make motions.

### *The Petition.*

7. Suits will be commenced by petition, verified in the manner provided by law, and filed in the office of the clerk, with one extra copy in print or type-writing. The clerk will note thereon the day of filing, and will cause one copy to be forwarded to the Attorney-General. Within twenty days thereafter, the claimant will file in the clerk's office twenty-five printed copies of such petition and note of filing, unless the court, on motion, waives this requirement.

The petition must comply with the Revised Statutes, Section 1072, and must also set forth<sup>1</sup> —

(1) The title of the action, with the full Christian and surnames of all the claimants.

<sup>1</sup> For other allegations, to be inserted in Congressional cases for stores and supplies under Bowman Act, see Rules 93-97; and in cases under French Spoliation Act, Rule 105.

(2) A plain, concise statement of the facts and circumstances, giving place and date, free from argumentative and impertinent matter.

(3) In every case transmitted by the head of a Department, by Congress, or a committee thereof, a copy of the order of transmission shall be set out or annexed.

(4) The prayer, in which the claimant must state distinctly the amount for which he demands judgment, or the relief for which he prays.

8. When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the Executive Departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon call upon the proper Department for such information or papers as it may deem necessary; and when the same are furnished, the petition may be amended, and the amended petition shall be printed and filed, and may take the place of the original petition.

9. If the claimant be an executor, administrator, guardian, or other representative, appointed by a judicial tribunal, a duly authenticated copy of the record of the appointment must be filed with the petition at the commencement of the action.

10. If the claim be founded upon an act of Congress, or upon a regulation of an Executive Department, the act and the section thereof upon which the claimant relies must be specified, and the particular regulation of the Department must be stated in terms.

11. If the claim be founded upon an express contract with the United States, such contract must be set forth in the petition, and, if it be in writing, must be annexed thereto. If it be founded upon an implied contract, the circumstances upon which the claimant relies to prove a contract must be specified. If it consists of several matters or items, each must be separately stated.

12. If the petition be verified by the attorney at law or other agent of the claimant, a power of attorney authorizing him to make the verification must be filed with it.

13. If a claimant desire to amend his petition at any time, he must set forth in his motion the specific amendments desired. If the motion be allowed, he must within twenty days thereafter file a copy of the petition, with the amendments properly incorporated therein, unless the court order otherwise.

14. If the claimant die pending the suit, his death may be suggested on the record, and his proper representative may, on motion, and on filing a duly authenticated copy of the record of his appointment as executor or administrator, be admitted to prosecute the suit.

### *Pleas.*

15. Demurrers to petitions and general traverses thereof must be filed within two months after the filing of the petition; and pleas averring special defense, set-off, or counter-claim, within one month after the claimant places his case on the notice-book.



16. When the Attorney-General demurs to the petition, he must set forth the grounds of the demurrer specially; but if the ground be that the petition does not allege fact sufficient to constitute a cause of action, that objection may be stated generally.

If the demurrer be sustained, the claimant may, once of right, amend his petition, within such time as the court may direct; but if he decline to amend, judgment will be rendered dismissing the petition.

If the demurrer be overruled, the defendants may, of right, plead to the petition, within such time as the court may direct; but if they decline so to plead, judgment will be rendered for the claimant according to the prayer of the petition; or the court will order an assessment of damages, as the Attorney-General may elect.

17. Within one month after the filing of a set-off or counter-claim by the defendants, the claimant must answer the same by a replication under oath; in default whereof the court may, after ten days' notice by the defendants to the claimant, order that the set-off or counter-claim be considered as admitted.

18. When the Attorney-General pleads, under section 1086 of the Revised Statutes, that the claimant has practiced or attempted to practice fraud, he shall set forth the facts with sufficient particularity to enable the claimant to answer the same in detail; and the claimant shall, within two months after the filing of said plea, reply to the same with particularity, under oath.

### *Motions.*

19. Motions will be heard in the first instance before a judge at chambers; but he may direct the same to be heard in open court. They must come to him through the clerk's office, and, when acted upon, will be returned there by him.

20. Motions must be in writing, signed by the attorney of record, and must give the title and number of the case and the term at which they are made; and in no case shall the clerk enter the motion unless this rule be complied with.

Any brief filed in connection with a motion must be printed or typewritten.

21. No order will be entered by the clerk unless it be directed from the bench, or be reduced to writing and marked "Allowed" by the Chief Justice or one of the Judges.

22. The clerk will not file any paper unless it be properly indorsed with the title and number of the suit and the name of the attorney filing it.

### *Service of Notices.*

23. Parties filing petitions, pleadings, and motions, except motions for calls on Departments, must at the same time leave with the clerk written notice thereof, addressed to the attorney of the adverse party, with postage prepaid, and the clerk will mail the same and note the fact on the general docket. All other notices to adverse parties may be served in like manner. The clerk's entry on his docket will be *prima facie* evidence of

the service. In the computation of time, the day of the service will be excluded, and the day on which a party is required to appear, or on which an act is required to be done, will be included.

*Witnesses.*

24. When a petition is filed, either party may proceed to take testimony, notwithstanding that issue of fact has not been joined or that issue on demurrer may be pending.

25. Unless the court order a witness to testify orally on the trial, the evidence of witnesses must be by deposition, taken either before a commissioner of the court, or a judge of a court of the United States, or a judge of a court of record in a State or Territory of the United States, or a commissioner appointed by a Circuit Court of the United States, or a notary public.

26. When a witness can be conveniently examined before a judge of this court, either party, at any time prior to the examination, may move for an order directing that his deposition be so taken.

27. If a witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

28. The fees of witnesses shall be such as are now, or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.

29. The court may order a witness or a claimant to be produced before the court or one of the judges thereof for examination.

*Depositions on Written Interrogatories.*

30. Depositions obtained in foreign countries must be taken on written interrogatories, sent out under a special commission issued by the clerk.

Depositions may be taken in like manner within the United States, by consent of parties, or when authorized by the court, or by a judge in vacation.

The written interrogatories must be filed in the clerk's office, and notice thereof given to the adverse party.

Within fifteen days after such notice, the adverse party may file objections to any of the interrogatories, specifically stating the grounds of objection; and may either file cross-interrogatories, or a notice that he will cross-examine the witnesses orally, which notice shall be attached to and sent out with the special commission.

If he file cross-interrogatories, the other party may, within fifteen days thereafter, file objections thereto, specifically stating the grounds of objection.

No objections to an interrogatory or a cross-interrogatory will be considered at the trial unless taken before the commission issues.

31. When a deposition is taken upon written interrogatories and written

cross-interrogatories, neither the Attorney-General, nor the claimant, his agent or attorney, nor any other person, shall be present at the examination of the witness; which fact shall be certified by the officer taking the deposition; who shall, in such cases, propound the interrogatories and cross-interrogatories to the witness in their order, and reduce his answers to writing as nearly as practicable in his precise words.

### *Depositions on Oral Examination.*

82. The party proposing to take depositions on oral examination shall cause fifteen days' notice to be given thereof to the other party. The notice must be in writing, and state the names of the witnesses to be examined, the day of the month, the hour, and the place of taking the deposition.

But no deposition, except by consent of parties, or the order of court, shall be taken during the day when the attorney of record for the claimant, or the attorney of the Department of Justice charged with preparation of the case or cases in which the deposition is to be used, is so engaged in the trial of cases in court that he cannot attend.

When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from Washington, or when the defendants propose to take the deposition, and the witness resides more than five hundred miles from the claimant or his attorney, one day's further notice shall be given for every additional hundred miles.

83. If the claimant proposes to take a deposition in the city of Washington, three days' notice shall be sufficient; and a like notice by the defendants shall be sufficient when the claimant's attorney resides in the city of Washington.

84. When a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down, as nearly as may be, in his own words, except so far as this may be expressly waived by consent of both parties.

85. No general objection to any question shall be noticed by the officer; but where an objection is made on specifically stated grounds, the officer shall record the same.

86. When depositions are taken on notice, as provided in Rule 32, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses; but in such case one day's notice must be given to the adverse party, or his attorney, there present.

### *General Provisions as to Depositions.*

87. Witnesses must be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, age, occupation, and place of residence; whether he has any, and, if any, what, interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant.

At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question; and if he does he shall state it.

The testimony of the witness when completed shall be read over to him, and be signed by him in the presence of the officer.

38. The officer should so connect the sheets of the deposition that they cannot be tampered with, and should return them sealed together. He should sign, and make the witness sign, each sheet; and generally he should spare no pains to return to the court the exact evidence he has taken.

All exhibits should be carefully marked so as to be capable of immediate identification, and, when practicable, should be attached to the deposition under seal.

39. The officer must state, in the caption of the deposition, the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition must also be shown by whom the witness was examined and cross-examined.

40. In his return the officer must show that the witness was properly sworn or affirmed, and that the answers were taken down in his presence, and read over to and signed by the witness.

41. The officer must inclose the commission, depositions, and exhibits in a packet, under his seal, and direct the same to the clerk of the court at Washington, and deposit the package in the post-office, or in an express office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet.

42. If the officer's fees be not paid at the time of taking the deposition, he should indorse on the outside of the packet the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof.

The packet must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon. The clerk will then open the packet, and tax the officer's charges at the rates hereinafter provided, and will immediately transmit to him the amount taxed, returning the overplus, if any, to the party.

The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor.

43. The fees shall be three dollars a day for attending to take the depositions, and fifteen cents a folio of one hundred words for taking and returning it; but this *per diem* allowance is limited to one day for a deposition or series of depositions taken in the same case: Short-hand reporters, acting as special commissioners, will receive, in addition to these fees, ten cents a folio for writing out the deposition from their notes.

44. Any permanent commissioner charging in excess of the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal conduct, and his commission will be revoked.

45. Objections to the notice, or the form and manner of taking or returning the testimony, must be made in writing, and filed within one month after notice of the filing of the deposition, or they will be considered as waived.

*Evidence Certified from the Departments.*

46. The Attorney-General may offer in evidence properly certified information and papers from any Executive Department, without calling for the same under the provisions of section 1076 of the Revised Statutes.

A call for such information and papers will be made at claimant's request, on the approval of a judge in chambers.

On the receipt of an answer to the call, the clerk will notify the claimant's counsel and the Attorney-General by post.

47. All information or papers furnished by an Executive Department in response to a call, or through the Attorney-General, is subject to objection by either party according to the rules of evidence at the common law; but neither party will be required to produce the originals of such papers, or to prove their execution, unless within one month after the return is filed the party objecting to such papers enter of record in the clerk's office a written denial of their genuineness.

Such information and papers in reply to a claimant's call, not objected to by him within ten days after return of the call, will be regarded as evidence offered by claimant.

48. Whenever it is charged in a petition that a contract has been made or other liability incurred through an officer or agent of the United States, other than the head of an Executive Department or the chief of a bureau, the claimant will be required to prove that such person was an officer or agent of the United States, by the certificate of the proper Executive Department, or by other legal and sufficient evidence.

49. Any information or papers certified from any Executive Department, and filed in any cause, may be used and applied in any other pending cause to which the same may be applicable or pertinent.

To entitle such information or papers to be used, copies thereof must be filed in such other cause before the same shall have been placed on the trial docket.

*Production of Original Papers by the Claimant.*

50. The court may, at the instance of the Attorney-General, order any claimant, his agent or attorney, to produce in court, or before any officer authorized to take depositions, any letters, papers, deeds, documents, or other writings in his possession or subject to his control, in any way relating to the claim sued upon; and any claimant, his agent or attorney, who, after due notice, refuses to produce such letters, papers, deeds, documents, or other writings, when in his power to do so, shall be subject to attachment for contempt; and, if he persists in such refusal, the court will direct the petition to be dismissed.

*Requests for Findings of Fact and Brief.*

51. The claimant may at any time give notice to the Attorney-General that his proof is closed on the merits, by an entry to that effect in the notice-book in the clerk's office. If the Attorney-General shall not within two months thereafter file a request for further time to take proof, the claimant may, at any time after the expiration of that period, have the

case placed on the trial list, provided he has filed requests for findings and brief.

52. The clerk shall not place a case on the trial list until the claimant files in the clerk's office twenty-five printed copies of a brief stating the points of law on which he relies, with reference to authorities, and twenty-five printed copies of the request for facts required by Rule V of the "Regulations prescribed by the Supreme Court of the United States under which appeals may be taken from the Court of Claims."

53. Such request must be in the following terms: "*The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:*"

Following this request must be a statement, in the form of distinct numbered propositions, of the facts which the party desires to have found; and each proposition must be so prepared, with respect to its length, subject, and phraseology, that the court may conveniently pass upon it; and they must be so arranged as to present a concise statement, in orderly and logical sequence, of the whole case, as the party desires it to appear in the findings of fact.

Subjoined to each proposition must be references to the pages of the record or to the unprinted evidence relied on in its support; but no evidence must be set out. Documents which may enter into the findings of fact need not be presented in the statement, but may be referred to therein by the pages of the record.

54. The Attorney-General, within one month after the filing of the claimant's brief and request, must file his brief and request for findings of fact, and should indicate the requests on the claimant's part to which no objection is made. Such request must be in form and substance like that required of the claimant by the next preceding section.

55. The attorney of each party shall append to his brief a table of each deposition, letter, document, or other paper which he may offer in evidence on the trial, with references to the pages of the record, if they be there, and if they be not of the printed record, then to the places where they may be found.

### *Neglected Cases.*

56. If the claimant neglect, for two years after filing his petition, to close his proof and give notice to the Attorney-General, as required by Rule 51, the defendants may place the case on the trial list.

### *Advancement of Cases.*

57. Whenever, in any case which the claimant has not put on the trial list, it shall be shown to the court that an early decision thereof is important to the interests of the Government, the case may, in the discretion of the court, be placed on the trial list by the defendants.

### *Trials and Other Proceedings in Court.*

58. When the defendants' brief and request are filed the case will be considered as ready for trial, and, when reached, a continuance will not be ordered, except by consent of parties or for good cause shown.



59. The trial docket will be made up monthly. Cases will go upon it in the order in which notices of trial have been filed.

60. The peremptory call of the trial docket will begin on the Tuesday after the first Monday of each month during the term.

61. No cases will be heard for trial unless the printed pleadings, evidence, and briefs be made up in book form together and paged consecutively, and a copy thereof furnished to each member of the court at the hearing; and all citations from, or references to, such pleadings, evidence, and briefs must be by the consecutive paging of such book.

62. The law docket will be taken up on Monday of each week during the term.

### *Printing.*

63. The testimony and briefs will be printed. In printing the testimony, the notices and officers' captions and certificates will be omitted; but to each deposition there must be prefixed a title in the following form:

*Deposition of — —, for claimant [or defendants, as the case may be], taken at — —, on the — — day of — —, 18—; claimant's counsel, — —; defendants' counsel, — —.*

64. Where an answer of a department is printed as evidence, the call for the same must be printed therewith.

65. Before printing a return made to a call on a Department, the chief clerk will withhold from the copy for the printer —

1st. All papers of which copies have been previously printed in the record of the case; and for this purpose he will compare the two copies, and if variations are found he will take the directions of a judge in chambers before sending the return to the printer.

2d. All certificates of authenticity and certificates of acknowledgment.

3d. All papers which both parties agreed to omit.

4th. All papers which a judge in chambers orders to be omitted.

In each case the chief clerk will make a memorandum of the omission in the copy for the printer, verified by his initials.

66. If the claimant objects to printing information or papers so returned, and the Attorney-General requests to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached; and when such information or papers are printed, the same will be regarded as evidence offered on the part of the defense.

67. The printed papers required by these rules must be in long primer type and on royal octavo pages, and the style and number of the case must be prefixed to all printed papers and to records of evidence.

68. No deposition, return, or record on file shall be taken from the custody of the clerk by a claimant or his attorney, but either may attend at the clerk's office, and prepare his evidence for the press in the form and manner before prescribed. When the evidence is complete and ready for the printer, the chief clerk will have it printed at the Public Printing Office.

69. The deposition of a claimant, taken under section 1080 of the Revised Statutes, shall not be printed, unless the Attorney-General shall first have filed in the case a written declaration of his intention to read the same in

evidence on the trial; and the filing of such declaration shall be considered as the exercise of the discretion vested in that officer by said section, and shall entitle the claimant to read the examination as evidence at the trial if the Attorney-General declines to do so unless for good cause shown the court shall otherwise order.

### *Limitation.*

70. If it appear on the face of the petition that the claim first accrued more than six years before the petition was filed, the claimant must aver therein the existence and period of duration of some disability, recognized by law, which prevented his filing his petition within that time; in default whereof, it will be considered that no such disability existed, and the petition may be dismissed on motion.

71. If the claimant, in avoidance of the bar of limitation, aver in his petition the existence and duration of any such disability, and it thereby appears that, after the disability ended, more than three years had elapsed before the petition was filed, the petition may be dismissed on motion.

72. If upon the face of the petition it does not appear when the claim first accrued, the court may require the claimant to make the petition definite and certain in that regard, and in default thereof may dismiss the suit.

73. Averments in regard to the time when a claim first accrued, or in regard to an alleged disability of the claimant, will be held to be put in issue by the defendants' general traverse.

### *Discontinuance.*

74. Where fraud or set-off is pleaded, the claimant shall not, without leave of the court, discontinue his suit. In other cases he may do so, either in open court, or, with the approval of a judge, in vacation.

### *Dismissal on Death of Claimant.*

75. On the death of a sole claimant if his executor or administrator does not come in and prosecute the action, as provided in Rule 14, on or before the first ten days of the next term after the suggestion is made, the case may be dismissed, provided the Attorney-General shall have served notice upon the attorney of record in the case three months at least before the commencement of such term.

### *New Trial.*

76. A new trial will not be granted where, upon the whole case, justice has been done between the parties and the judgment is substantially right, although there may have been some mistakes committed at the trial.

In cases transmitted to the court by Congress, or a committee thereof or by the head of a Department, under the Acts of March 3, 1883, ch. 116, and March 3, 1887, ch. 359; and in cases under the French Spoliation Act of January 20, 1885, ch. 25, new trials will not be granted on motion of claimant after the findings have been reported as required by law.

But new trials may be granted on motion of defendants for the causes and within the time specified in section 1088 of the Revised Statutes.

77. A motion by a claimant for a new trial may be founded upon one or more of the following grounds: 1st. Error of fact; 2d. Error of law; and 3d. Newly-discovered evidence. It must be made at the term in which the judgment is rendered, and before the commencement of the long vacation. In case of judgment entered within thirty days before the summer adjournment, then such motion may be made before the end of the vacation.

78. A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.

79. A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

80. A motion upon the ground of newly-discovered evidence will not be entertained unless it appear that the newly-discovered evidence came to the knowledge of the claimant or his attorney after the trial and before the motion was made; that it was not for want of due diligence that it did not sooner come to his knowledge; that it is so material that it would probably produce a different judgment if the new trial were granted; and that it is not cumulative.

Such motion must be accompanied by the affidavit of the claimant or his attorney of record, setting forth —

1st. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence.

2d. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts.

3d. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel, until after the close of the trial.

4th. The reasons why the claimant and his attorney of record and his said counsel could not have discovered said evidence before the trial, if due diligence had been used.

81. If the court desires to hear argument upon a motion by a claimant for a new trial, the motion will be ordered to the law docket; otherwise decision will be announced from the bench without hearing.

### *Appeals.*

82. Applications for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing, and signed by the claimant or his attorney of record, if the appeal be on his behalf; or, if taken by the United States, it must be signed by the Attorney-General or his assistant.

83. Such application, if made when the court is not in session, must be filed with the clerk, and the date of filing the same must be indorsed upon it and noted upon the general docket.

*Clerk's Office.*

84. During term time the clerk's office must be kept open every day, except Sundays and holidays, from 9:30 A. M. to 4 P. M., or to such later hours as the court may be in session or in conference. During the Christmas holidays, the office may be closed at 1 P. M., and in vacation at 3 P. M.

85. When the court is in session, both the chief clerk and the assistant clerk will be at the office during office hours. In vacation they may arrange their hours to suit each other and the public business.

86. The chief clerk will have charge of the journal of the court, of the law and trial dockets, and of the printing; and he will also prepare the annual return to Congress.

87. The assistant clerk will attend to office business, and will have charge of the general docket, the notice book, and the giving of notices under these rules.

88. In the absence of the chief or the assistant clerk, his duties will be temporarily performed by the other.

89. Any one wishing to see any papers on file in the clerk's office will apply therefor to the chief or assistant clerk, who will take them from their place of deposit, and return them thereto when done with; and no such papers can be taken out of the clerk's office, except by authority of the court, or one of the members thereof.

*Withdrawal of Papers.*

90. Papers shall not be withdrawn from the files except on motion for good cause shown, and upon such terms as the court or a judge may order.

*Extension of Time.*

91. The time named in these rules for the doing of any act may be extended on motion for good cause shown.

*Department Cases Under Bowman Act, etc.*

92. Cases involving controverted questions of fact or law in any claim or matter, transmitted to the court under the provisions of section 2 of the act of March 3, 1883, chapter 116, entitled, "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government" (23 Stat. L. 283), and of section 12, of "An act to provide for the bringing of suits against the Government," chapter 859 (23 Stat. L. 505), shall be proceeded with in like manner, and subject to the same rules, so far as applicable, as other cases in the court under its general jurisdiction, except as herein provided.

93. Within two months after the filing of a case transmitted to the court, or within such further time as the court may allow, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, in accordance with Rule 7.

94. Any person claiming to be indirectly interested in any question involved in such case may, by leave of court, be permitted to appear and be heard on the one side or the other, as his interest may require, upon filing

a petition, under oath, setting forth specifically and concisely how he claims to be so interested, and submitting the questions raised to the decision of the court.

95. If no claimant, directly or indirectly interested, appears and files his petition within said two months, the Attorney-General or Assistant Attorney-General charged with defending the Government in this court, may set the case down for trial upon such evidence as he may submit.

### *Congressional Cases.*

96. Within two months after the filing of a case transmitted to the court by Congress, or either House, or by a committee, or within such further time as the court may allow, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, in accordance with Rule 7.

Thereafter the case shall be proceeded with in like manner, and subject to the same rules, so far as applicable, as other cases in the court under its general jurisdiction.

97. In cases for stores and supplies the petition, or if already filed, an amended petition, shall embrace the following:—

a. An allegation as to loyalty of the party from whom the supplies were taken, or person furnishing same.

b. If the suit is by legal representative it must be alleged when and by what authority such party was appointed such representative. And it must be alleged that the claimant brings into court his warrant of authority.

c. It must be alleged that the claim was before the Southern Claims Commission, Quartermaster-General, or Commissary-General of Subsistence, and with what result, together with a brief statement of the ground given therefor.

d. It must show the items of account before said Commission or officers, and which of said items are now presented to this court.

e. It must be stated which house of Congress or committee referred the case, with the date thereof.

f. It must be stated what troops or command took or were furnished the supplies, when they were taken, and at what place taken.

98. No submission of a case on loyalty or merits will be permitted until the following requirements are complied with by claimant's attorney, under the supervision of the bailiff:—

a. When petition is on loyalty, the petition, all reports previously made by any officers on the subject, abstract of evidence, briefs on both sides, and other most important papers relied upon by either party, must be selected, strapped together, and placed on top of the bundle of papers to be sent to the conference room.

b. When submission is on merits, two extra copies of petition, the reports of officers previously made on the merits of the claim, abstract of evidence, with the original evidence, requests for findings, briefs on both sides, finding of loyalty, and a statement of the case, made up by filing one of the blank findings printed for the court, down to the allegations of the petition, must in like manner be strapped together and put at top of bundle to be sent to conference room.

*Loyalty in Cases for Supplies, etc.*

99. In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late war for the suppression of the rebellion, no testimony shall, without authority of a judge of the court or the consent of both parties, be taken in regard to the merits of the claim until after the preliminary inquiry in regard to the claimant's loyalty shall have been decided in his favor.

100. Cases for decision on preliminary questions of loyalty may be submitted without being put on the trial docket as prescribed by Rule 51. But each party must file one type-written copy of a brief referring to the evidence relied upon, or giving a full abstract of the same, and must comply with Rule 98.

*Depositions, etc., before Southern Claims Commission.*

101. If a claim which was at any time before the Commissioners of Claims, appointed under the act of March 8, 1871, be transmitted to this court by either house of Congress, or by any committee thereof, under said act, and with such claim there be transmitted depositions, which were duly taken in conformity with the rules of said Commission, such depositions may be used by either party as evidence at the preliminary inquiry aforesaid, or at the final hearing of the cause, or at both, subject to such objections to their competency or relevancy as might be made if the deponents were examined in open court, or their depositions were regularly taken under the rules of this court.

102. If it be made to appear that, besides the depositions so transmitted, there are among the papers of said Commission other such depositions relating to the claimant's loyalty, or to the merits of his claim, a judge of the court may authorize such depositions, or duly certified copies thereof, to be obtained and filed in the clerk's office of this court, to be used as evidence in the same manner and on the same terms as if they had been transmitted with the claim.

103. To entitle either party to use as evidence any deposition under either of the next two preceding sections there must be given to the other party at least two months' notice of the intention so to use it.

104. No such depositions shall be printed unless authorized by a judge of the court.

*French Spoliation Claims.*

105. Parties having a common interest, growing out of the seizure of the same vessel or its cargo, may unite in one petition for the recovery of their respective claims, which may be heard together.

Where insurance was made in his own name by one for himself and others, or as agent for others, or by a keeper of an insurance office, in either case, or in case of an agent for underwriters, in respect of a policy or a loss thereunder from spoliation, his administrator, appointed in the jurisdiction of his last domicile, may file one petition on each policy for all the underwriters thereon, and the personal representatives of the underwriters may come in and be heard thereon in respect of their respective interests.

To avoid multiplicity of petitions in behalf of separate underwriters



upon a single policy, the personal representative of any one may file a petition for his decedent setting up the interests of all underwriters upon the same policy, and thereafter.

On or before January 20, 1887, the representatives of any or all the other underwriters on the policy may by motion be permitted to become parties to that petition, and they will be heard as to their respective interests after filing letters of administration.

When the petition of the owners of a vessel or its cargo sets out an insurance thereon, the insurers may, under the same restrictions and in the same manner, on motion, prosecute their respective interests in the same case.

Where claimants are firms or joint owners the petition of the personal representative of the last survivor may be made in behalf of all, and the personal representatives of the others may come in and be heard in respect to their interests.

106. Before the defendant shall be required to place any case on trial, the claimants on account of the vessel, cargo, or insurance, or some one or more of them concerned in the same seizure, shall furnish to the Attorney-General a printed statement of alleged facts under the heads hereinafter set out.

At the time of trial one copy shall be furnished to each of the judges. Documents not printed in the record must be numbered, put in envelopes (as far as practicable), and noted on the outside thereof.

Under each head reference must be made to the pages of the printed record, and to unprinted and separate documents by number of envelope and number of paper therein, or other convenient designation, relied upon in support of allegations.

No case can be submitted until these requirements are complied with.

### *Form of Statement.*

#### TITLE OF CASE.

(1) Name of vessel and master.

Docket number of each case with names of claimants, and, where there are intervenors, their names to be set out under the case in which they intervene, with the number of any separate petition by them; to be made up after the manner of the case of the schooner "Phoenix," reported to Congress thus:—

#### *Schooner Phoenix—Solomon Babson, master.*

- 129. Thomas Cushing, administrator of Marston Watson, claimant.
- 8162. Charles T. Lovering, administrator of Joseph Taylor, claimant.  
James C. Davis, administrator of Cornelius Durant, claimant.
- 260. Charles F. Adams, administrator of Peter C. Brooks, claimant.  
William Sohler, administrator of Nathaniel Fellowes, claimant.
- (4264) Francis M. Boutwell, administrator of Benjamin Cobb, claimant.
- (4257) Charles F. Hunt, administrator of Joseph Russell, surviving partner of Jeffrey & Russell, claimant.
- Frederick O. Prince, administrator of James Prince, claimant.
- Thomas H. Perkins, administrator of John C. Jones, claimant.

VESSEL.

- (2) Name of owners, and their respective shares.
- (3) When and where built.
- (4) Register.
- (5) Date of sailing and points of departure and destination.
- (6) Seizure and condemnation.
- (7) Facts relied upon as showing illegality of condemnation.
- (8) Insurance on vessel or freight, naming all the underwriters and amount admitted to have been paid to each owner on account of loss, and from whom received. Refer to policies and other evidence.

CARGO.

- (9) Owners of cargo, stating each separately, and whether the interest be in whole or divided, with number of cases in which they appear.
- (10) Value of cargo and of each claimant's interest therein.
- (11) Insurance on cargo, naming all the underwriters and amount admitted to have been paid to each owner on account of loss, and from whom received. Refer to policies and other evidence.

VESSEL, CARGO, AND INSURANCE.

- (12) Assignments.
- (13) When there are adverse claimants, the facts alleged by each claimant to be specified.
- (14) In cases of intervention, the date or filing of motion, and case in which filed, to be stated with reference to envelope in which same are to be placed.
- (15) Evidence of citizenship of claimants and identity must be referred to under their respective names.
- (16) Time of death of partners when administrator sues as representative of survivor.
- (17) Administrators, receivers, and assignees, when and where appointed, and evidence of appointments.
- (18) When facts relied upon as found in other cases, such cases must be specifically referred to.

RECAPITULATION AND SUMMARY.

Name of each claimant, stating number of petition, and where printed or found, and when an intervenor, the date of intervention and where motion is found, and setting forth exactly in items what is claimed by him in all, as owner of vessel or cargo, or as insurer, stated separately and *with references* as aforesaid, so that the court may readily find all the evidence necessary to state each claimant's case distinctly.

107. In all other respects the general rules of the court shall, so far as applicable, be the rules under the French Spoliation Act.

## VIII.

### RULES OF COURT OF PRIVATE LAND CLAIMS.

**I. *Duties of the Clerk.***—The clerk shall be the custodian of the records of the court. He shall keep the following records at each place at which the regular terms of the court are held, viz., a journal in which he shall record all orders, decrees, and judgments entered by the court, an appearance docket in which he shall enter the title of all claims or causes filed or brought in the court at that place, and in which he shall note the filing of the petition and all pleadings filed subsequent thereto, and a reference showing the journal page of all orders and entries made in the progress of the cause.

He shall also keep a book for the use of the court at each term, in which he shall enter each cause then pending at that place and undisposed of, by its title, leaving sufficient blank space opposite each case for the entry by the court of the memoranda of orders and judgments.

And the clerk shall keep an office at each place, at which the regular terms of court are held. Every cause brought by a claimant of land under the provisions of the 6th and 8th sections of the Act approved March 3, 1891, establishing the court, shall be entitled in the name of such claimant or claimants as plaintiff, against the United States and such other person or persons as may be designated as holding or claiming adversely to the plaintiff as defendant, and such title shall be preserved in the pleadings, and all other papers filed in the cause, and in all journal entries made during its progress, and all writs, citations, and processes issued therein, and all causes brought by instruction of the Department of Justice as provided by the 8th section of said Act, and in all journal entries, writs, citations, and processes therein, the United States shall be designated as plaintiff, and the adverse party or parties as the defendant.

The clerk shall keep a roll of attorneys. Any attorney who is a member of the Supreme Court of the United States, or of any Circuit Court of the United States, or of the highest court of the State or Territory in which he resides, shall, upon exhibiting his certificate of admission to the clerk, be entitled to have his name entered upon the roll of attorneys, and to appear in any cause pending before the court.

Actions relating to lands in Wyoming, Nevada, Arizona, or Utah, may, at the election of plaintiff, be brought and presented at either of the places where the regular terms are held.

**II. *As to the Filing of Petitions, etc.***—Every person filing a petition in this court for the confirmation of any claim to land under any grant, shall at the time of filing such petition, deliver to the clerk of the court, or the deputy clerk, the original documents constituting or creating such grant, also the original documents of all intermediate assignments or

conveyances of any right or interest in such grant evidencing the right so claimed by the petitioner.

If, however, any such original document cannot, for any reason, be delivered as herein required, the reason thereof shall be stated, and if such document be in existence but not under the control of petitioner, the name and place of the holder shall be stated, and if it be claimed that any such document be lost or destroyed, the facts and circumstances of such loss or destruction shall be stated. The clerk or deputy so receiving such documents, shall receipt for same, and such document shall not be removed from the custody of this court until the final determination of the confirmation or rejection of such claim. Whenever any original document in any other than the English language shall be delivered to the custody of the court, as herein required, it shall be the duty of the official interpreter to at once translate the same into English in duplicate, one of which shall be filed with the clerk and the other delivered to the United States attorney for this court. Whenever any petitioner shall claim any rights by reason of an inheritance by descent, or by testamentary disposition, he shall set forth in his petition the names and citizenship of all deceased persons through whom it is claimed such right is derived, and the names of the heirs of such deceased persons, and shall set forth the law of the place affecting such right of inheritance. And in case any such right depends upon the last will of any deceased person, the petitioner shall, at the time of filing his petition, deliver to the clerk or deputy a copy of such will, together with a copy of the records of the probate thereof, if any such had been had. Upon filing any petition, the petitioner shall, at the time of filing the same, deliver to the clerk or deputy a true copy thereof for each person to be served with such petition.

*III. Rules as to Pleadings.*—Until the further order of this court, the time for pleadings in all cases shall be extended to the third day of the term at which the cause is returnable.

*IV. Witnesses and their Testimony.*—In all cases witnesses for either party shall be examined in open court upon the trial of the cause, unless they are sick, infirm, or otherwise unable to attend, and in that event either party desiring the testimony of such witness or witnesses shall make application to the court, or any judge thereof, to take the deposition of such witness or witnesses, and if it appears to the satisfaction of the court or judge that such witness or witnesses ought not to be compelled to appear in court and testify, the court or judge shall make an order allowing the deposition of said witness or witnesses to be taken. Either party applying for an order to take the deposition as herein provided, shall give notice to the adverse attorney of record of the time and place of making such application, at least five days before the day upon which the same is to be made, and shall state the name and residence of each witness whose deposition is desired. The application shall state the name and residence of each witness whose deposition is desired, and what is expected to be proven by each, together with the reasons why such witness should not be required to attend and testify, and the same shall be verified by the oath of some party in interest, or an attorney of record in the cause, and

in all cases where an order is made by the court or judge to take the deposition of any witness or witnesses, the time and places of taking such depositions shall be stated in said order.

V. *Commission, and to whom directed.*—The commission to take depositions of any witness or witnesses may be directed to a commissioner of any Circuit Court of the United States, or to any person qualified to take testimony by the laws of the State or Territory in which the same is to be executed. The person to whom the same shall be directed shall be named therein, and the place of his residence shall be given in a manner that he may be easily found. When the commission shall be directed to an officer of the State or Territory in which it may be executed, a certificate of the official character and authority of such officer from some court or other proper source, shall be returned with it. The manner of certifying and returning depositions shall be as provided in the laws of the State or Territory where taken.

VI. *Depositions, how opened and filed.*—Either party may give five days' notice to the opposite party of his intention to apply to the clerk to open and file depositions which have been returned in the court, and if no objections shall be made in writing within the time specified, such depositions may be published as of course. Objections which may be made as aforesaid shall be set down for hearing before a judge of the court on like notice.

VII. *Attorney for the United States.*—The attorney for the United States for this court shall not be required to verify by oath any application or motion made to the court or any judge thereof.

VIII. *Rule as to Costs.*—At the time of filing a petition, all parties other than the United States are required to make a deposit with the clerk, of such sum as he may determine to be necessary to pay the fees of the marshal for serving a copy of the petition and citations.

## IX.

### GENERAL ORDERS IN BANKRUPTCY.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

#### *Docket.*

I. The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

#### *Filing of Papers.*

II. The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

#### *Process.*

III. All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.



*Conduct of Proceedings.*

IV. Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the Circuit or District Court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

*Frame of Petitions.*

V. All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

*Petitions in Different Districts.*

VI. In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

*Priority of Petitions.*

VII. Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said peti-

tions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

### *Proceedings in Partnership Cases.*

VIII. Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

### *Schedule in Involuntary Bankruptcy.*

IX. In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

### *Indemnity for Expenses.*

X. Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

*Amendments.*

**XI.** The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

*Duties of Referee.*

**XII. 1.** The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

**2.** The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

**3.** Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

*Appointment and Removal of Trustee.*

**XIII.** The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

*No Official or General Trustee.*

**XIV.** No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

*Trustee not Appointed in Certain Cases.*

**XV.** If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

*Notice to Trustee of his Appointment.*

XVI. It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

*Duties of Trustee.*

XVII. The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

*Sale of Property.*

XVIII. 1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

*Accounts of Marshal.*

XIX. The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and

for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

### *Papers Filed After Reference.*

XX. Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

### *Proof of Debts.*

XXI. 1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

### *Taking of Testimony.*

XXII. The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

### *Orders of Referee.*

XXIII. In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

### *Transmission of Proved Claims to Clerk.*

XXIV. The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.



*Special Meeting of Creditors.*

XXV. Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

*Accounts of Referee.*

XXVI. Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

*Review by Judge.*

XXVII. When a bankrupt, creditor or trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

*Redemption of Property and Compounding of Claims.*

XXVIII. Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit, or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

*Payment of Moneys Deposited.*

XXIX. No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered

in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

### *Imprisoned Debtor.*

XXX. If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

### *Petition for Discharge.*

XXXI. The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

### *Opposition to Discharge or Composition.*

XXXII. A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

### *Arbitration.*

XXXIII. Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

*Costs in Contested Adjudications.*

XXXIV. In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

*Compensation of Clerks, Referees and Trustees.*

XXXV. 1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

*Appeals.*

XXXVI. 1. Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an

appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

### *General Provisions.*

XXXVII. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

### *Forms.*

XXXVIII. The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

## FORMS IN BANKRUPTCY.

[N. B.— Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

## FORM No. 1.—DEBTOR'S PETITION.

*To the Honorable — —, Judge of the District Court of the United States for the — District of —:*

The petition of — —, of —, in the county of —, and district and State of —, — [state occupation], respectfully represents:

That he has had his principal place of business [or has resided, or has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at —, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

— —, Attorney.

— —.

UNITED STATES OF AMERICA, } ss.  
District of —.

I, — —, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

— —, Petitioner.

Subscribed and sworn to before me this — day of —, A. D. 18—

— —, [Official character.]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.
(1.) Taxes and debts due and owing to the United States....						\$ a
(2.) Taxes due and owing to the State of _____, or to any county, district, or municipality thereof....						
(3.) Wages due workmen, clerks or servants, to an amount not exceeding \$300 each, earned within three months before filing the petition.....						
(4.) Other debts having priority by law....						
Total ...						

\_\_\_\_\_, Petitioner.



SCHEDULE A. (2)

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					\$	c	\$	c
.....	.....	.....	.....	.....				
.....	.....	.....	.....	.....				
.....	.....	.....	.....	.....				
				Total....	.....	.....	.....	.....

— —, Petitioner.

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.	
					\$	c
.....	.....	.....	.....	.....		
.....	.....	.....	.....	.....		
.....	.....	.....	.....	.....		
				Total....		

— —, Petitioner.

## SCHEDULE A. (4)

*Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors or indorsers.*

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown that fact must be stated).	Place where contracted.	Nature and liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
.....	.....	.....	.....	.....	\$	c
.....	.....	.....	.....	.....		
Total....						

— — —, Petitioner.

## SCHEDULE A. (5)

*Accommodation paper.*

[N. B.—The dates of the notes or bills, and when due, with the names and residences of drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residence (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
.....	.....	.....	.....	.....	.....	\$	c
.....	.....	.....	.....	.....	.....		
Total....							

— — —, Petitioner.

OATH TO SCHEDULE A.

UNITED STATES OF AMERICA, } ss.  
District of —,

On this — day of —, A. D. 18—, before me personally came — —, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of congress relating to bankruptcy.

Subscribed and sworn to before me this — day of —, A. D. 18—. — —, [Official character.]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Inoumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
.....	.....	.....	\$	c.
.....	.....	.....		
.....	.....	.....		
		Total....		

— —, Petitioner.

SCHEDULE B. (2)

Personal property.

a.— Cash on hand.....	\$	c.
b.— Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....		
c.— Stock in trade, in — business of — —, at —, of the value of —.....		
d.— Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz... ..		
e.— Books, prints, and pictures, viz.....		
f.— Horses, cows, sheep, and other animals (with number of each), viz.....		
g.— Carriages and other vehicles, viz.....		
h.— Farming stock and implements of husbandry, viz.....		
i.— Shipping, and shares in vessels, viz.....		
k.— Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.... ..		
l.— Patents, copyrights, and trade-marks, viz.. ..		
m.— Goods or personal property of any other description, with the place where each is situated, viz.....		
Total.....		

— —, Petitioner.

SCHEDULE B. (3)

Choses in action.

	Dollars.	Cents.
a.—Debts due petitioner on open account.....		
b.—Stocks in incorporated companies, interest in joint-stock companies, and negotiable bonds.....		
c.—Policies of insurance.....		
d.—Unliquidated claims of every nature, with their estimated value.....		
e.—Deposits of money in banking institutions and elsewhere		
Total.....		

— —, Petitioner.

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
Interest in land .....		\$	c.
Personal property . .....			
Property in money, stock, shares, bonds, annuities, etc.....			
Rights and powers, legacies and bequests .....	Total.....		
Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor .....		\$	c.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy....	Total.....		

— —, Petitioner.

SCHEDULE B. (5)

*A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.*

	Valuation.	
	\$	c.
Military uniform, arms, and equipments.....		
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption .....		
Total.....		

— —, Petitioner.

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

- Books.

{

.....

.....

.....
- Deeds.

{

.....

.....

.....
- Papers.

{

.....

.....

.....

— —, Petitioner.

OATH TO SCHEDULE B.

UNITED STATES OF AMERICA, } ss.  
District of \_\_\_\_.

On this \_\_\_\_ day of \_\_\_\_, A. D. 18—, before me personally came \_\_\_\_, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

\_\_\_\_, [Official character.]

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A. and B.]

Schedule A....	1 (1) Taxes and debts due the United States .....		
" "	1 (2) Taxes due States, counties, districts, and municipalities .....		
" "	1 (3) Wages .....		
" "	1 (4) Other debts preferred by law .....		
Schedule A....	2 Secured claims .....		
Schedule A....	3 Unsecured claims .....		
Schedule A....	4 Notes and bills which ought to be paid by other parties thereto...		
Schedule A....	5 Accommodation paper .....		
	Schedule A, total .....		
Schedule B....	1 Real estate .....		
Schedule B....	2-a Cash on hand .....		
" "	2-b Bills, promissory notes, and securities .....		
" "	2-c Stock in trade .....		
" "	2-d Household goods, etc .....		
" "	2-e Books, prints, and pictures .....		
" "	2-f Horses, cows, and other animals ..		
" "	2-g Carriages and other vehicles .....		
" "	2-h Farming stock and implements...		
" "	2-i Shipping and shares in vessels ...		
" "	2-k Machinery, tools, etc .....		
" "	2-l Patents, copyrights, and trademarks .....		
" "	2-m Other personal property .....		
Schedule B....	3-a Debts due on open accounts .....		
" "	3-b Stocks, negotiable bonds, etc .....		
" "	3-c Policies of insurance .....		
" "	3-d Unliquidated claims .....		
" "	3-e Deposits of money in banks and elsewhere .....		
Schedule B....	4 Property in reversion, remainder, trust, etc .....		
Schedule B....	5 Property claimed to be excepted ..		
Schedule B....	6 Books, deeds, and papers .....		
	Schedule B, total ..		



## FORM No. 2.—PARTNERSHIP PETITION.

*To the Honorable — —, Judge of the District Court of the United States  
for the — District of —.*

The petition of — — respectfully represents:

That your petitioners and — — have been partners under the firm name of — —, having their principal place of business at —, in the county of —, and district and State of —, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by — oath—, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by — oath—, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said — — further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said — — further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said — — further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said — further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

— —,  
— —,  
— —,

— —, Attorney.

Petitioners.

— —, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

— —,  
— —,  
— —,

Petitioners.

Subscribed and sworn to before me this — day of —, A. D. 18—.

— —, [Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

### FORM NO. 3.—CREDITORS' PETITION.

*To the Honorable — —, Judge of the District Court of the United States for the — District of —:*

The petition of — —, of —, and — —, of —, and — —, of —, respectfully shows:

That — —, of —, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business [or resided, or had his domicile] at —, in the county of — and State and district aforesaid, and owes debts to the amount of \$1,000.

That your petitioners are creditors of said — —, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows: —.

And your petitioners further represent that said — — is insolvent, and that within four months next preceding the date of this petition the said — — committed an act of bankruptcy, in that he did heretofore, to wit, on the — day of —, —.

Wherefore your petitioners pray that service of this petition, with a subpoena, may be made upon — —, as provided in the acts of Congress re-

lating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

— —,  
— —,  
— —,

Petitioners

— —, Attorney.

UNITED STATES OF AMERICA, }  
District of —, } ss.

— —, — —, — —, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, — —, this — day of —, 189—.

— —, [Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

#### FORM NO. 4.—ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
— —, } In Bankruptcy.

Upon consideration of the petition of — — that — — be declared a bankrupt, it is ordered that the said — — do appear at this court, as a court of bankruptcy, to be holden at —, in the district aforesaid, on the — day of —, at — o'clock in the —noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena, be served on said — —, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable — —, judge of the said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 18—.

[SEAL OF THE COURT.]

— —, Clerk.

#### FORM NO. 5.—SUBPOENA TO ALLEGED BANKRUPT.

UNITED STATES OF AMERICA, }  
— District of —, }

To — —, in said District, GREETING:

For certain causes offered before the District Court of the United States of America within and for the — district of —, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at —, in said district, on the — day of —, A. D. 189—, — — to answer to a petition filed by — — in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, this — day of —, A. D. 189—.

[SEAL OF THE COURT.]

— —, Clerk.

## FORM No. 6.—DENIAL OF BANKRUPTCY.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— — —

At —, in said district, on the — day of —, A. D. 18—.

And now the said — — appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [or, he demands that the same may be inquired of by a jury].

Subscribed and sworn to before me this — day of —, A. D. 18—.

— —, [Official character.]

## FORM No. 7.—ORDER FOR JURY TRIAL.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— — —

At —, in said district, on the — day of —, 18—.

Upon the demand in writing filed by — —, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency, may be inquired of by a jury, it is ordered that said issue be submitted to a jury.

[SEAL OF THE COURT.]

— —, Clerk.

## FORM No. 8.—SPECIAL WARRANT TO MARSHAL.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— — —

*To the Marshal of said District or to either of his Deputies, GREETING:*

Whereas a petition for adjudication of bankruptcy was, on the — day of —, A. D. 18—, filed against — —, of the county of — and State of —, in said district, and said petition is still pending; and whereas it satisfactorily appears that said — — has committed an act of bankruptcy [or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said — —, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable — —, judge of the said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 18—.

[SEAL OF THE COURT.]

— —, Clerk.

## RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named — —, and of all his deeds, books of account, and papers which have come to my knowledge.

— —,  
Marshal [or Deputy Marshal].

*Fees and expenses.*

1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mile each way ..		
3. Actual expenses in custody of property and other services as follows .....		
[Here state the particulars.]		

\_\_\_\_\_,  
Marshal [or Deputy Marshal].

District of \_\_\_\_\_, A. D. 18—.

Personally appeared before me the said \_\_\_\_\_, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

\_\_\_\_\_, Referee in Bankruptcy.

FORM No. 9.—BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, \_\_\_\_\_ as principal, and \_\_\_\_\_ as sureties, are held and firmly bound unto \_\_\_\_\_, in the full and just sum of \_\_\_\_\_ dollars, to be paid to the said \_\_\_\_\_, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the \_\_\_\_\_ district of \_\_\_\_\_ against the said \_\_\_\_\_, and the said \_\_\_\_\_ has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said \_\_\_\_\_, subject to the further orders of said District Court:

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said \_\_\_\_\_ shall indemnify the said \_\_\_\_\_ for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of:

_____.	_____.	[SEAL.]
_____.	_____.	[SEAL.]
	_____.	[SEAL.]

Approved this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_, District Judge.

FORM No. 10.—BOND TO MARSHAL.

Know all men by these presents: That we, \_\_\_\_\_ as principal, and \_\_\_\_\_ as sureties, are held and firmly bound unto \_\_\_\_\_, marshal of the United States for the \_\_\_\_\_ district of \_\_\_\_\_, in the full and just sum of \_\_\_\_\_ dollars, to be paid to the said \_\_\_\_\_, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind our-

selves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this — day of —, A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the — district of —, against the said — —, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said — —, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said District Court upon a petition of said — — has ordered the said property to be released to him:

Now, therefore, if the said property shall be released accordingly to the said — —, and the said — —, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:

— —, [SEAL]  
— —, [SEAL]  
— —, [SEAL]

Approved this — day of —, A. D. 189—.

— —, District Judge.

#### FORM No. 11.—ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —.

At —, in said district, on — day of —, A. D. 18—, before the Honorable — —, judge of the — district of —.

This cause came on to be heard at —, in said court, upon the petition of — — that — — be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said — — was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 18—.

[SEAL OF THE COURT.]

— —, Clerk.

#### FORM No. 12.—ADJUDICATION OF BANKRUPTCY.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At —, in said district, on the — day of —, A. D. 18—, before the Honorable — —, judge of said court in bankruptcy, the petition of



189—, according to the provisions of the acts of Congress relating to bankruptcy:

It is thereupon ordered, that said matter be referred to — —, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said — — shall attend before said referee on the — day of — at —, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said — bankruptcy.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 18—.

[SEAL OF THE COURT.]

— —, Clerk.

### FORM No. 15.—ORDER OF REFERENCE IN JUDGE'S ABSENCE.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —,

Whereas on the — day of —, A. D. 18—, a petition was filed to have — —, of —, in the county of — and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy, on the next day after the last day on which pleadings might have been filed, and some have been filed by the bankrupt or any of his creditors*], it is thereupon ordered that the said matter be referred to — —, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said — — shall attend before said referee on the — day of —, A. D. 189—, at —.

Witness my hand and the seal of the said court, at —, in said district, on the — day of —, A. D. 189—.

[SEAL OF THE COURT.]

— —, Clerk.

### FORM No. 16.—REFEREE'S OATH OF OFFICE.

I, — —, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God. — —.

Subscribed and sworn to before me this — day of —, A. D. 18—.

— —, District Judge.

### FORM No. 17.—BOND OF REFEREE.

Know all men by these presents: That we, — — of — as principal, and — — of —, and — — of —, as sureties, are held and firmly bound to the United States of America in the sum of — dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves,

our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this — day of —, A. D. 189—.

The condition of this obligation is such that whereas the said — — has been on the — day of —, A. D. 18—, appointed by the Honorable — —, judge of the District Court of the United States for the — district of —, a referee in bankruptcy, in and for the county of —, in said district, under the acts of Congress relating to bankruptcy:

Now, therefore, if the said — — shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of  
— —, [L. S.]  
— —, [L. S.]  
— —, [L. S.]

Approved this — day of —, A. D. 189—. — —, District Judge.

FORM NO. 18.—NOTICE OF FIRST MEETING OF CREDITORS.

*In the District Court of the United States for the — District of —. In Bankruptcy.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

*To the Creditors of — —, of —, in the County of —, and District aforesaid, a Bankrupt:*

Notice is hereby given that on the — day of —, A. D. 18—, the said — — was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at — in —, on the — day of —, A. D. 18—, at — o'clock in the —noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

— —, 18—. — —, Referee in Bankruptcy.

FORM NO. 19.—LIST OF DEBTS PROVED AT FIRST MEETING.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

At —, in said district, on the — day of —, A. D. 18—, before — —, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.
.....	.....		
.....	.....		
.....	.....		

— —, Referee in Bankruptcy.

**FORM No. 20.—GENERAL LETTER OF ATTORNEY IN FACT WHEN  
CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.**

*In the District Court of the United States for the — District of —,*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

To — —, — —:

I, — —, of —, in the county of — and State of —, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof, may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the — day of —, A. D. 189—. — —. [L. S.]

Signed, sealed, and delivered in presence of — —,

Acknowledged before me this — day of —, A. D. 189—.

— —, [Official character.]

**FORM 21.—SPECIAL LETTER OF ATTORNEY IN FACT.**

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

To — —, — —:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at —, on the — day of —, before — —, or any adjournment thereof, and then and there — for — and in — name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt. — —. [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the — day of —, A. D. 189—.

Signed, sealed, and delivered in presence of — —,

Acknowledged before me this — day of —, A. D. 18—.

— —, [Official character.]

FORM No. 22.— APPOINTMENT OF TRUSTEE BY CREDITORS.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

At —, in said district, on the — day of —, A. D. 18—, before —  
—, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint — —, of —, in the county of — and State of —, to be the trustee— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of same.	Amount of debt.	
		Dolls.	Cts.
.....	.....		
.....	.....		
.....	.....		

Ordered that the above appointment of trustee— be, and the same is hereby, approved. — —, Referee in Bankruptcy.

FORM No. 23.— APPOINTMENT OF TRUSTEE BY REFEREE.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

At —, in said district, on the — day of —, A. D. 18—, before —  
—, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed were present, or duly represented, failed to make choice of a trustee of in the county of —, and State of —, as trustee of the same. said bankrupt's estate, and therefore I do hereby appoint — —, of —, — —, Referee in Bankruptcy.

**FORM No. 24.—NOTICE TO TRUSTEE OF HIS APPOINTMENT.**

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

*To — — of —, in the County of —, and District aforesaid:*

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the — day of —, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at — dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at — the — day of —, A. D. 18—.

— —, Referee in Bankruptcy.

**FORM No. 25.—BOND OF TRUSTEE.**

Know all men by these presents: That we, — — of —, as principal, and — — of —, and — — of —, as sureties, are held and firmly bound unto the United States of America in the sum of — dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this — day of —, A. D. 18—.

The condition of this obligation is such, that whereas the above-named — — was, on the — day of —, A. D. 18—, appointed trustee in the case pending in bankruptcy in/said court, wherein — — is the bankrupt, and he, the said — —, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said — —, trustee as aforesaid, shall obey such orders as the court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in presence of

— —,  
— —,

— —, [SEAL]  
— —, [SEAL]  
— —, [SEAL]

**FORM No. 26.—ORDER APPROVING TRUSTEE'S BOND.**

At a court of bankruptcy, held in and for the — district of —, at —, —, this — day of —, 189—.

Before — —, referee in bankruptcy, in the District Court of the United States for the — district of —.

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

It appearing to the court — —, of —, and in said district, has been duly appointed trustee of the estate of the above named bankrupt,

and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [or by order of the court], to wit, in the sum of — dollars, it is ordered that the said bond be, and the same is hereby, approved.

— —, Referee in Bankruptcy

**FORM No. 27.— ORDER THAT NO 'TRUSTEE BE APPOINTED.**

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

— —, Referee in Bankruptcy.

**FORM No. 28.— ORDER FOR EXAMINATION OF BANKRUPT.**

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

At —, on the — day of —, A. D. 18—.

Upon the application of — —, trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before — —, one of the referees in bankruptcy of this court, at — on the — day of —, at — o'clock in the — noon, to submit to examination under the act of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

— —, Referee in Bankruptcy.

**FORM No. 29.— EXAMINATION OF BANKRUPT OR WITNESS.**

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

At —, in said district, on the — day of —, A. D. 18—, before — —, one of the referees in bankruptcy of said court.

— —, of —, in the county of —, and State of —, being duly sworn and examined at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

— —, Referee in Bankruptcy.

**FORM No. 30.— SUMMONS TO WITNESS.**

To — —:

Whereas — —, of —, in the county of —, and State of —, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the — district of —,



These are to require you, to whom this summons is directed, personally to be and appear before — —, one of the referees in bankruptcy of the said court, at —, on the — day of —, at — o'clock in the — noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, this day of —, A. D. 189—. — —, Clerk.

## RETURN OF SUMMONS TO WITNESS.

*In the District Court of the United States for the — District of —.*

In the Matter of — —, Bankrupt. } In Bankruptcy.

On this — day of —, A. D. 18—, before me came — —, of —, in the county of — and State of —, and makes oath, and says that he did, on —, the — day of —, A. D. 189—, personally serve — —, of — in the county of — and said State of —, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons. — —.

Subscribed and sworn to before me this — day of —, A. D. 18—. — —.

## FORM No. 31.—PROOF OF UNSECURED DEBT.

*In the District Court of the United States for the — District of —.*

In the Matter of — —, Bankrupt. } In Bankruptcy.

At —, in said district of —, on the — day of —, A. D. 189—, came — —, of —, in the county of —, in said district of —, and made oath, and says that — —, the person by [or against] whom a petition for adjudication in bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of — dollars; that the consideration of said debt is as follows: —; that no part of said debt has been paid [except —]; that there are no set-offs or counter-claims to the same [except —]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

— —, Creditor.

Subscribed and sworn to before me this — day of —, A. D. 18—. — —, [Official character.]

## FORM No. 32.—PROOF OF SECURED DEBT.

*In the District Court of the United States for the — District of —.*

In the Matter of — —, Bankrupt. } In Bankruptcy.

At —, in said district of —, on the — day of —, A. D. 189—, came — —, of —, in the county of —, in said district of —, and made oath, and says that — —, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in

the sum of — dollars; that the consideration of said debt is as follows: —; that no part of said debt has been paid [except —]; that there are no set-offs or counter-claims to the same [except —]; and that the only securities held by this deponent for said debt are the following: —.

— —, Creditor.

Subscribed and sworn to before me this — day of —, A. D. —.

— —, [Official character.]

### FORM No. 33.—PROOF OF DEBT DUE CORPORATION.

*In the District Court of the United States for the — District of —.*

In the Matter of     }  
— —, Bankrupt.     } In Bankruptcy.

At —, in said district of —, on the — day of —, A. D. 189—, came — —, of —, in the county of — and State of —, and made oath and says that he is — of the —, a corporation incorporated by and under the laws of the State of —, and carrying on business at —, in the county of — and State of —, and that he is duly authorized to make this proof, and says that the said — — the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of — dollars; that the consideration of said debt is as follows: —; that no part of said debt has been paid [except —]; that there are no set-offs or counter-claims to the same [except —]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

— —, — of said Corporation.

Subscribed and sworn to before me this — day of —, A. D. 18—.

— —, [Official character.]

### FORM No. 34.—PROOF OF DEBT BY PARTNERSHIP.

*In the District Court of the United States for the — District of —.*

In the Matter of     }  
— —, Bankrupt.     } In Bankruptcy.

At —, in said district of —, on the — day of —, A. D. 189—, came — —, of —, in the county of —, in said district of —, and made oath and says that he is one of the firm of — —, consisting of himself and — —, of —, in the county of — and State of —; that the said — —, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of — dollars; that the consideration of said debt is as follows: —; that no part of said debt has been paid [except —]; that there are no set-offs or counter-claims to the same [except —]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

— —, Creditor.

Subscribed and sworn to before me this — day of —, A. D. 18—.

— —, [Official character.]

## FORM No. 35.—PROOF OF DEBT BY AGENT OR ATTORNEY.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At — in said district of — on the — day of — A. D. 189—, came — —, of —, in the county of —, and State of —, attorney [or authorized agent] of —, in the county of —, and State of —, and made oath and says that — —, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said — —, in the sum of — dollars; that the consideration of said debt is as follows: —; that no part of said debt has been paid [except —]; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says that this deposition cannot be made by the claimant in person because —, and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied. — —.

Subscribed and sworn to before me this — day of —, A. D. 18—,  
— —, [Official character.]

## FORM No. 36.—PROOF OF SECURED DEBT BY AGENT.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At —, in said district of —, on the — day of —, A. D. 189—, came — —, of —, in the county of —, and State of —, attorney [or, authorized agent] of —, in the county of —, and State of —, and made oath, and says that — —, the person by [or, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said — — in the sum of — dollars; that the consideration of said debt is as follows: —; that no part of said debt has been paid [except —]; that there are no set-offs or counter-claims to the same [except —]; and that the only securities held by said — for said debt are the following —; and this deponent further says that this deposition cannot be made by the claimant in person because —, and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated. — —.

Subscribed and sworn to before me this — day of —, A. D. 18—,  
— —, [Official character.]

FORM No. 37.— AFFIDAVIT OF LOST BILL, OR NOTE.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

On this — day of —, A. D. 18—, at —, came — —, of —, in the county of —, and State of —, and makes oath and says that the bill of exchange [or note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, —, and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said — —, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [or note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

*Bill or note above referred to.*

Date.	Drawer or maker.	Acceptor.	Sum.
.....	.....	.....	
.....	.....	.....	
.....	.....	.....	

Subscribed and sworn to before me this — day of —, A. D. 18—,  
— —, [Official character.]

FORM No. 38.— ORDER REDUCING CLAIM.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At —, in said district, on the — day of —, A. D. 18—.  
Upon the evidence submitted to this court upon the claim of — — against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of —, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of —, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the — day of —, A. D. 18—].  
— —, Referee in Bankruptcy.

FORM No. 39.— ORDER EXPUNGING CLAIM.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At —, in said district, on the — day of —, A. D. 18—.  
Upon the evidence submitted to the court upon the claim of — —

against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

— —, Referee in Bankruptcy.

FORM No. 40.— LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At —, in said district, on the — day of —, A. D. 18—.

*A list of debts proved and claimed under the bankruptcy of — —, with — dividend at the rate of — per cent. this day declared thereon by — —, a referee in bankruptcy.*

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.
	.....				
	.....				
	.....				

— —, Referee in Bankruptcy.

FORM No. 41.— NOTICE OF DIVIDEND.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt.

At —, on the — day of —, A. D. 18—.

To — —, *Creditor of — —, Bankrupt:*

I hereby inform you that you may, on application at my office, —, on the — day of —, or on any day thereafter, between the hours of —, receive a warrant for the — dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

— —, Trustee.

CREDITOR'S LETTER TO TRUSTEE.

To — —, *Trustee in Bankruptcy of the Estate of — —, Bankrupt:*

Please deliver to — — the warrant for dividend payable out of the said estate to me.  
— —, Creditor.

**FORM No. 42.—PETITION AND ORDER FOR SALE BY AUCTION  
OF REAL ESTATE.**

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

Respectfully represents — —, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: —. Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this — day of —, A. D. 18—. — —, Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing — — in favor of said petition and — — in opposition thereto*], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this — day of —, A. D. 18—.

— —, Referee in Bankruptcy.

**FORM No. 43.—PETITION AND ORDER FOR REDEMPTION OF PROP-  
ERTY FROM LIEN.**

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

Respectfully represents — —, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property, has been pledged or deposited and is subject to a lien*] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of —, being the amount of said lien, in order to redeem said property therefrom.

Dated this — day of —, A. D. 18—. — —, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing — — in favor of said petition and — — in opposition thereto*], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the fore-



going petition the sum of —, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this — day of —, A. D. 189—.

— —, Referee in Bankruptcy.

#### FORM No. 44.— PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
— —, Bankrupt. } In Bankruptcy.

Respectfully represents — —, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this — day of —, A. D. 189—.

— —, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat, [*or after hearing — — in favor of said petition and — — in opposition thereto*], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or, at private sale*], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this — day of —, A. D. 189—.

— —, Referee in Bankruptcy.

#### FORM No. 45.— PETITION AND ORDER FOR PRIVATE SALE.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
— —, Bankrupt. } In Bankruptcy.

Respectfully represents — —, duly appointed trustee of the estate of the aforesaid bankrupt:

That for the following reasons, to wit, —, it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit: —,

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this — day of —, A. D. 189—.

— —, Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing — — in favor of said pe-*

tition and — — in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this — day of —, A. D. 189—.   
 — —, Referee in Bankruptcy.

FORM No. 46.— PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

Respectfully represents — —, the said bankrupt, [or, a creditor, or the receiver, or the trustee of the said bankrupt's estate]:

That a part of the said estate, to wit, —, now in —, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this — day of —, A. D. 189—. — —.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of said bankrupt, [or without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [or after hearing — — in favor of said petition and — — in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this — day of —, A. D. 189—.   
 — —, Referee in Bankruptcy.

FORM No. 47.— TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

At —, on the — day of —, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolla.	Cts.
Military uniform, arms, and equipments.....	.....		
Property exempted by State laws .....	.....		

— —, Trustee.

FORM No. 48.—TRUSTEE'S RETURN OF NO ASSETS.

*In the District Court of the United States for the — District of —.*  
*In the Matter of*  
— —, Bankrupt. } *In Bankruptcy.*  
At —, in said district, on the — day of —, A. D. 18—. *On the day aforesaid, before me comes — —, of —, in the county of — and State of —, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.*  
Subscribed and sworn to before me at —, this — day of —, A. D. 18—. — —, Referee in Bankruptcy.

FORM No. 49.—ACCOUNT OF TRUSTEE.

DR. *The estate of — —, bankrupt, in acct. with — —, trustee.* CR.

		\$	c.	\$	c.			\$	c.	\$	c.
.....	.....					.....	.....				
.....	.....					.....	.....				
.....	.....					.....	.....				

FORM No. 50.—OATH TO FINAL ACCOUNT OF TRUSTEE.

*In the District Court of the United States for the — District of —.*  
*In the Matter of*  
— —, Bankrupt. } *In Bankruptcy.*  
On this — day of —, A. D. 18—, before me comes — —, of —, in the county of — and State of —, and makes oath, and says that he was, on the — day of —, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing — sheets of paper, the first sheet whereof is marked with the letter — [reference may here also be made to any prior account filed by said trustee], is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts. — —, Trustee.  
Subscribed and sworn to before me at —, in said — district of —, this — day of —, A. D. 18—. — —, [Official character.]

FORM No. 51.—ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.

*In the District Court of the United States for the — District of —.*  
*In the Matter of*  
— —, Bankrupt. } *In Bankruptcy.*  
The foregoing account having been presented for allowance, and having

been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

— —, Referee in Bankruptcy.

### FORM NO. 52.— PETITION FOR REMOVAL OF TRUSTEE.

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

To the Honorable — —, Judge of the District Court for the — District of —:

The petition of — —, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that — —, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore — — pray that notice may be served upon said — —, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

— —,

### FORM NO. 53.— NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

At — —, on the — day of —, A. D. 18—.

To — —, Trustee of the Estate of — —, Bankrupt:

You are hereby notified to appear before this court, at — —, on the — day of —, A. D. 18—, at — o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of — —, one of the creditors of said bankrupt, filed in this court on the — day of —, A. D. 18—, in which it is alleged [*here insert the allegation of the petition*].

— —, Clerk.

### FORM NO. 54.— ORDER FOR REMOVAL OF TRUSTEE.

*In the District Court of the United States for the — District of —.*

In the Matter of  
— —, Bankrupt. } In Bankruptcy.

Whereas — —, of — —, did, on the — day of —, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, — —, the trustee of the estate of said — —, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said — — and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said — be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said —, trustee [or, out of the estate of the said —, subject to prior charges].

Witness the Honorable —, judge of the said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 18—.

[SEAL OF THE COURT.]

—, Clerk.

#### FORM NO. 55.— ORDER FOR CHOICE OF NEW TRUSTEE.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
—, Bankrupt. } In Bankruptcy.

At —, on the — day of —, A. D. 18—.

Whereas by reason of the removal [or the death or resignation] of —, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at —, in —, in said district, on the — day of —, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

—, Referee in Bankruptcy.

#### FORM NO. 56.— CERTIFICATE BY REFEREE TO JUDGE.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
—, Bankrupt. } In Bankruptcy.

I, —, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at —, the — day of —, A. D. 18—.

—, Referee in Bankruptcy.

#### FORM NO. 57.— BANKRUPT'S PETITION FOR DISCHARGE.

In the Matter of }  
—, Bankrupt. } In Bankruptcy.

*To the Honorable —, Judge of the District Court of the United States for the District of —:*

—, of —, in the county of — and State of —, in said district, respectfully represents that on the — day of —, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and

has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this — day of —, A. D. 189—. — —, Bankrupt.

#### ORDER OF NOTICE THEREON.

DISTRICT OF —, ss.

On this — day of —, A. D. 189—, on reading the foregoing petition, it is —

Ordered by the court, that a hearing be had upon the same on the — day of —, A. D. 189—, before said court, at —, in said district, at — o'clock in the —noon; and that notice thereof be published in —, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the same time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable — —, judge of said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 189—.

[SEAL OF THE COURT.]

— —, Clerk.

— hereby depose, on oath, that the foregoing order was published in the — on the following — days, viz:

On the — day of — and on the — day of —, in the year 189—. — —.

DISTRICT OF —.

— —, 189—.

Personally appeared — —, and made oath that the foregoing statement by him subscribed is true.

Before me,

— —, [Official character.]

I hereby certify that I have on this — day of —, A. D. 189—, sent by mail copies of the above order, as therein directed. — —, Clerk.

#### FORM No. 58.—SPECIFICATIONS OF GROUNDS OF OPPOSITION TO BANKRUPT'S DISCHARGE.

*In the District Court of the United States for the — District of —.*

In the Matter of } In Bankruptcy.  
— —, Bankrupt. }

— —, of —, in the county of — and State of —, a party interested in the estate of said — —, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]  
— —, Creditor.



## FORM No. 59.—DISCHARGE OF BANKRUPT.

DISTRICT COURT OF THE UNITED STATES, }  
       — District of —, }

Whereas, — — of —, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said — — be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the — day of —, A. D. 189—, on which day the petition for adjudication was filed — him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable — —, judge of said District Court, and the seal thereof, this — day of —, A. D. 189—.

[SEAL OF THE COURT.]

— —, Clerk.

## FORM No. 60.—PETITION FOR MEETING TO CONSIDER COMPOSITION.

*District Court of the United States for the — District of —.*

— —, Bankrupt — In Bankruptcy.

*To the Honorable — —, Judge of the District Court of the United States for the — District of —:*

The above-named bankrupt respectfully represents that a composition of — per cent. upon all unsecured debts, not entitled to a priority — — in satisfaction of — debts has been proposed by — to — creditors, as provided by the acts of Congress relating to bankruptcy, and — verily believes that the said composition will be accepted by a majority in number and in value of — creditors whose claims are allowed.

Wherefore, he prays that a meeting of — creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

— —, Bankrupt.

## FORM No. 61.—APPLICATION FOR CONFIRMATION OF COMPOSITION.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
 — —, Bankrupt. } In Bankruptcy.

*To the Honorable — —, Judge of the District Court of the United States for the — District of —:*

At —, in said district, on the — day of —, A. D. 189—, now comes — —, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [or at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in

all to the sum of — dollars, has been deposited, subject to the order of the judge, in the — National Bank, of —, a designated depository of money in bankruptcy cases.

Wherefore the said — — respectfully asks that the said composition may be confirmed by the court. — —, Bankrupt.

**FORM No. 62.— ORDER CONFIRMING COMPOSITION.**

*In the District Court of the United States for the — District of —.*

In the Matter of }  
— —, Bankrupt. } In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable — —, judge of said court, and the seal thereof, this — day of —, A. D. 189—.

[SEAL OF THE COURT.]

— —, Clerk.

**FORM No. 63.— ORDER OF DISTRIBUTION ON COMPOSITION.**

UNITED STATES OF AMERICA.

*In the District Court of the United States for the — District of —.*

In the Matter of }  
— —, Bankrupt. } In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable — —, judge of said court, and the seal thereof, this — day of —, A. D. 189—.

[SEAL OF THE COURT.]

— —, Clerk.

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[PREPARED BY MORRIS COOPER AND FRANK RAY KIMBLEY OF THE NEW YORK BAR.]

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